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Recent Developments in the United States Court of Military Appeals 1978–1979

By Major John K. Wallace, III, JAGC,
Instructor, Criminal Law, TJAGSA

In this article, Major Wallace reviews in outline form the activities of the Court of Military Appeals during the past year.

In past years, the annual review of new developments in military justice was routinely published in the Military Law Review. However, under the current Court of Military Appeals, military justice is changing so rapidly that a Review article on the subject is likely to be out of date by the time it is published.

This issue of The Army Lawyer is devoted to criminal law. It is hoped that such a concentration of material will increase the usefulness of the issue to practitioners in the field.

I. GENERAL TRENDS

Throughout 1978–1979 the United States Court of Military Appeals played a significant, but in many regards disappointing, role in supervising the administration of military justice and the evolution of the military justice system. The digest[1] which follows analyzes by subject-matter the significant opinions of the

Court during that period. While the digest addresses the individual decisions of the Court in greater specificity several broad trends are evident from the operation of the Court during 1978 and 1979.

1. The Court continued to enjoy political limelight and public notority within the military community. The Court and many of its decisions have received widespread public criticism on several occasions from well known official personages including the General Counsel of the Department of Defense,[2] The Judge Advocates General of the various services,[3] a member of the federal judiciary[4] and most recently members of the Joint Chiefs of Staff.[5] The Court did not suffer this criticism passively; frequently the Chief Judge has responded in kind.[6]

2. While the Court has recognized the necessity for a separate military justice system, in its opinions it has repeatedly indicated that the military justice system must be consistent with constitutional due process and may differ from civilian models only to the extent authorized by Congress and necessitated by the unique military environment. For example, while in *Harris*,[7] *Verdi*[8] and *Ezell*[9] the Court recognized in separate contexts the concept of "military necessity," in *Heard*,[10] *Frederick*,[11] *Payne*,[12] *Malia*[13] and *Brownd*[14] the Court applied civilian models to military practice and in three of these cases invalidated inconsistent provisions of the Manual for Courts-Martial.[15]

3. The Court has recognized discipline and justice as separate and distinct functions.

a. In Stewart v. Stevens[16] the court refrained from expanding its supervisory role into the command function of discipline.

b. However, the Court has emphatically held that "true" criminal proceedings relate to a judicial function which may not be used simply as a disciplinary tool. Thus, any attempt by a commander to orchestrate or influence the discharge of a judicial function has been soundly condemned by the Court.[17]

c. To the extent that the disciplinary function spills over into the judicial function the Court has assumed supervisory responsibility and required compliance with fundamental concepts of justice. For example, in *Booker*[18] and *Mathews*[19] the Court expressly recognized the disciplinary responsibility of the commander but promulgated specific limitations on the admissibility of evidence of prior conviction by summary court-martial or prior receipt of non-

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judicial punishment. Such a limitation upon the admissibility of a summary court-martial conviction is somewhat anomalous since both the Supreme Court[20] and the Court of Military Appeals[21] have recognized as constitutionally permissible the sentencing of an accused to confinement by a summary court-martial without representation of counsel or waiver.

4. The Court has failed satisfactorily to fulfull its role in providing sound leadership to trial and intermediate appellate courts in the military justice system.

a. The Court has repeatedly failed in its own opinions to distinguish holding from dicta. For example, in a footnote in *Jackson*[22] the Court suggested that the *Courtney*[23] equal protection standard for punishment of drug offenses applied to the military as a whole and required inter-service uniformity. This suggestion was expressly rejected as dicta in *Hoesing*.[24] On the other hand, in *Nault*[25] the Chief Judge gratuitously observed in an unnecessary footnote that chain of custody receipts were inadmissible hearsay since they were prepared principally for prosecution. This footnote dicta was elevated to the status of holding in *Porter*.[25] The difficulty now facing the practitioner or intermediate court confronted with a footnote suggestion issue is obvious.

b. In several areas, decisions of the Court have failed to demonstrate a degree of sophistication and consistency necessary to resolve important issues. Several examples are available to illustrate this point. For example, in apparent dicta in *Verdi*[27] the Court failed to distinguish "burden of coming forward" and "ultimate risk of nonpersuasion" but rather combined both concepts under the broad designation of "burden of proof," thereby requiring the prosecution to anticipate a possible defense and prove a negative. Such confusing dicta was unnecessary since the defense fulfilled its burden of coming forward at trial. Second, the recent decisions of the Court addressing the propriety of general deterrence arguments by a trial counsel are irreconcilible by their own language and cannot be read as consistent without reference to the records of trial.[28] The failure of the Court to achieve sophisticated analysis is perhaps best exemplified by its recent opinions in the area of self-incrimination. In *Annis*,[29] Chief Judge Fletcher found proper the prosecution introduction of a pretrial statement of the accused where the evidence indicated that the witness had "read rights to the accused" without regard to what rights were read. While the evidence had been received without defense objection, Chief Judge Fletcher based his decision on the "presumption of regularity," not waiver.[30] Judge Perry concurred finding Article[31] warnings inapplicable where the accused did not intend to utter incriminating words,[32] and Judge Cook concurred by invoking a concept of waiver resulting from an absence of timely objection.[33] This complex area of the law was further muddied by the Court's broad statement in *Mathews*[34] to the effect that Article 31 was inapplicable to the sentencing phase of a court-martial unless the accused was confronted with possible self-incrimination of uncharged misconduct. Finally, the Court's indecisiveness can be further demonstrated by simply citing in full two cases, United States v. Booker[35] and United States v. Crowley.[36]

c. The Court has failed to perform its supervisory appellate functions in a timely manner. This lack of timely response by the Court is certainly not entirely the fault of the individual judges. As Chief Judge Fletcher recently observed,[36] the practice of military law has become increasingly more complex, the Court has been confronted with more issues of major significance. Notwithstanding the increasingly active role of the court, its automated research and docket control procedures have become models for many civilian courts. The work product of the Court, in terms of cases heard and decided, compares very favorably with most of the state supreme courts having, even those having many more members and larger clerical staffs.

In summary, while criticism comes easy and many problems remain, it cannot be denied that the Court has through its efforts continued to enhance the quality of justice afforded a military accused. Perhaps, in the days of the volunteer force, this enhancement of a military ac-

cused's rights and the publicity it has received may surpass in importance the problems created by the Court.

[1] The author gratefully acknowledges the dedicated efforts of CPT (P) John S. Cooke, JAGC, U.S. Army Trial Judiciary, formerly Instructor, Criminal Law Division, TJAGSA who initiated "COMA Watch" and who developed the basic structure of the topical index upon which the digest is organized.

[2] *See, e.g.*, Remarks of Ms. Deanne C. Siemer, General Counsel, Department of Defense at the Pacific Command Legal Conference, Fort DeRussy, Hi. (Mar. 6, 1978). *See also* Army Times, Feb. 19, 1979, at 51, col. 1; and Army Times, May 14, 1979, at 36, col. 1

[3] *See, e.g.*, Remarks by Rear Admiral William O. Miller, Judge Advocate General of the Navy, and Major General Wilton B. Persons, Jr., The Judge Advocate General of the Army, to the American Bar Association Midyear Meeting, New Orleans, La. (Feb. 10, 1978), reprinted in *The Army Lawyer*, May 1978 at 9. and 16. Remarks of Brigadier General James P. King, Director, Judge Advocate Division, U.S.M.C. to the Pacific Command Legal Conference, Fort DeRussy, Hi. (Mar. 7, 1978).

[4] Remarks of the Honorable Oliver Gash, Judge, United States District Court for the District of Columbia, delivered at The Judge Advocate General's School, U.S. Army, Charlottesville, Va. (Mar. 10, 1978) reprinted in *The Army Lawyer*, Jun. 1978 at 1.

[5] *See* Philpott, *Top COMA Judge, Military at 'War,'* Army Times, Apr. 30, 1979 at 4, col. 1.

[6] *E.g.*, Remarks of Chief Judge Fletcher, note 34, *infra*. *See, e.g.*, Army Times, Nov. 28, 1977 at 30 col. 1; Army Times, Aug. 7, 1978, at 6 col. 1; Army Times, Nov. 13, 1978 at 32 col. 1; Army Times, Mar. 12, 1979 at 7 col. 1; and Army Times, May 14, 1979, at 36, col. 4.

[7] United States v. Harris, 5 M.J. 44 (C.M.A. 1978).

[8] United States v. Verdi, 5 M.J. 330 (C.M.A. 1978).

[9] United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

[10] United States v. Heard, 3 M.J. 14 (C.M.A. 1977). In *Heard* the Court determined that the provisions of para. 20c, *Manual for Courts-Martial, United States* 1969 (Rev. ed.) pertaining to the imposition of pretrial confinement were invalid since they were beyond the scope of the President's authority under *Uniform Code of Military Justice* art. 36, 10 U.S.C. § 836 (1976). In his lead opinion in United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) Judge Perry observed at that while the search and seizure authorization provisions of para. 152 were also arguably beyond the scope of art. 36 they were certainly within the President's powers as Commander-in-Chief under the provisions of the U.S. *Const. art. II*. It is interesting to note that no mention was made this latter source of authority in either *Heard* or *Frederick*. While *Frederick* is arguably distinguishable since it relates to substance and ultimate guilt or innocence of the accused, *Heard* appears indistinguishable.

[11] United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

[12] United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

[13] United States v. Malia, 6 M.J. 65 (C.M.A. 1978).

[14] United States v. Brownd, 6 M.J. 338 (C.M.A. 1979).

[15] MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (Rev. ed.).

[16] 5 M.J. 220 (C.M.A. 1978).

[17] *See, e.g.*, United States v. Rosser, 6 M.J. 267 (C.M.A. 1979); United States v. Malia, 6 M.J. 65 (C.M.A. 1978); 4 M.J. 20 (C.M.A. 1977); and United States v. Holland.

[18] United States v. Booker, 3 M.J. 443 (C.M.A. 1977), republished at 5 M.J. 238, opinion on reconsideration 5 M.J. 246 (C.M.A. 1978).

[19] United States v. Mathews, 6 M.J. 357 (C.M.A. 1979).

[20] Middendorf v. Henry, 425 U.S. 25 (1976).

[21] United States v. Booker, 5 M.J. 246 (C.M.A. 1978) (opinion on reconsideration).

[22] United States v. Jackson, 3 M.J. 101, 102 n. 2 (C.M.A. 1977).

[23] United States v. Courtney, 1 M.J. 438 (C.M.A. 1976).

[24] United States v. Hoesing, 5 M.J. 355 (C.M.A. 1978). *Accord*, United States v. Thurman 7M.J. 26 (C.M.A. 1979).

[25] United States v. Nault, 4 M.J. 318 (C.M.A. 1978).

[26] United States v. Porter, 7 M.J. 32 (C.M.A. 1979).

[27] United States v. Verdi, 5 M.J. 330 (C.M.A. 1978).

[28] For an excellent discussion of the confusion now surrounding the general deterrence issue resulting from seemingly inconsistent recent opinions of the Court, *see* Basham, *General Deterrence Arguments, The Army Lawyer*, April 1979 at 5.

[29] United States v. Annis, 5 M.J. 351 (C.M.A. 1978).

[30] *Id.*, at 352.

[31] *Uniform Code of Military Justice*, art. 31, 10 U.S.C. §831 (1976).

[32] United States v. Annis, 5 M.J. 351, 354 (C.M.A. 1978).

[33] *Id.*

[34] United States v. Mathews, 6 M.J. 357 (C.M.A. 1979).

[35] *See* n. 17, *supra*.

[36] United States v. Crowley, 3 M.J. 988 (A.C.M.R. 1977)

(en banc), *pet. denied*, 4 M.J. 165 (C.M.A. 1977), *pet. granted*, 4 M.J. 171 (C.M.A. 1977), *rev'd mem.* 4 M.J. 170 (C.M.A. 1977), *pet. reconsideration granted*, 4 M.J. 272 (C.M.A. 1978).

[37] Remarks by The Honorable Albert B. Fletcher, Jr. to the Pentagon Chapter of the Federal Bar Association at Bolling Air Force Base (Apr. 10, 1979).

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II. DIGEST OF OPINIONS

A. The Role of the Trial Judge.

1. In General. "The Trial judge is more than a mere referee, and as such, he is required to assure that the accused receives a fair trail." *United States v. Graves*, 50 C.M.R. 393, 396, 1 M.J. 50, 53 (C.M.A. 1975).

2. Protection of the Accused's Interests.

a. Evidence.

"[I]t is the trial judge who bears primary responsibility for insuring that only admissible evidence finds it way into the trial." *United States v. Rivas*, 3 M.J. 282,286 (C.M.A. 1977).

b. Multiple Representation.

United States v. Davis, 3 M.J. 430 (C.M.A. 1977) (trial judge committed reversible error by failing to apprise accused of apparent conflict of counsel and to obtain accused's knowing and intelligent waiver on record).

c. Advice to the Accused and Providence Inquiries.

United States v. King, 3 M.J. 458 (C.M.A. 1977) (full compliance with the inquiry into a negotiated plea described in *United States v. Green*, 1 M.J. 453 (C.M.A. 1976), required; substantial compliance insufficient).

(2) *But see United States v. Easley*, 4 M.J. 768 (A.C.M.R. 1977), *pet. denied*, 5 M.J. 132 (C.M.A. 1978) (failure of trial judge expressly to inquire into comportment of interpretation held not reversible error under facts). *See also United States v. Crowley*, 3 M.J. 988 (A.C.M.R. 1977) (en banc), *pet. denied*, 4 M.J. 165 (C.M.A. 1977), *pet. granted*, 4 M.J. 171 (C.M.A. 1977), *rev'd mem.* 4 M.J. 170 (C.M.A. 1977), *pet. reconsideration granted*, 4 M.J. 272 (C.M.A. 1978).

(3) *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) (confessional stipulation admissible notwithstanding para. 15 4b (1), MCM, provided trial judge conducts additional inquiry into stipulation). *Compare United States v. Long*, 3 M.J. 400 (C.M.A. 1977).

(4) *United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979) (accused's pleas of guilty not rendered involuntary by ex parte "philosophical" discussions on sentencing between trial defense counsel and military judge; failure of the military judge to make timely inquiry into existence of pretrial agreements did not require reversal where it was clear from appellate record that no pretrial agreement, in fact, existed).

(5) *United States v. Barnes*, 6 M.J. 356 (C.M.A. 1979) (no prejudice resulted from the failure of the military judge specifically to advise the accused of his right to remain silent during E&M where the defense counsel made an unsworn statement on behalf of the accused).

(6) *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979) (where defense counsel failed to object to admissibility of Article 15 in sentencing, military judge properly conducted an inquiry of the accused as to the foundation for its admissibility).

(7) *United States v. Schmidt*, 7 M.J. 15 (C.M.A. 1979) (held proper for military judge to conduct an Article 39(a) session in the absence of the defense counsel to determine whether the accused desired to await counsel's return from emergency leave or to request appointment of another counsel).

d. Arguments.

United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977) (trial judge committed re-

versible error by failing to interrupt improper argument of trial counsel; absence of defense objection did not constitute waiver).

e. Presence of Court Members.

United States v. Colon, 6 M.J. 73 (C.M.A. 1978) (military judge committed reversible error by proceeding to trial with only 6 of 10 detailed members present without first notifying convening authority for excusal of absent members; error was not jurisdictional since quorum still present; absence of defense objections not waiver).

f. Presence of Witnesses.

(1) In general, if a defense requested witness is material, the witness must be produced or proceedings abated. *See* Protection of Rights of the Accused, Witnesses and Discovery, *infra*.

(2) *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977) (determination of materiality/cumulative nature of requested witness' testimony within discretion of military judge). *Accord, United States v. Scott*, 5 M.J. 431 (C.M.A. 1978).

g. Evidentiary Hearings.

United States v. Whitehead, 5 M.J. 294 (C.M.A. 1978) (trial judge has a sua sponte obligation to conduct evidentiary hearing into propriety of prosecution following grant of testimonial immunity; absence of defense objection to prosecution not waiver).

h. Declaration of a Mistrial.

(1) *United States v. Thompson*, 5 M.J. 28 (C.M.A. 1978) (curative instruction cured any prejudice resulting from government misconduct; refusal to grant defense motion for mistrial proper).

(2) *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979) (decision to declare a mistrial is within the sound discretion of the military judge; however, judge abused discretion in refusing to declare a mistrial where one member exhibited a lack of candor in attempting to avoid challenge and where accuser-commander presented appearance of unlawful command influence in his conduct in the presence of both government and defense witnesses).

3. Rules of Evidence and Procedure.

a. Admissibility of Evidence.

(1) *United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977) (refusal of trial judge to admit witness' hearsay statement against penal interest held to be violation of due process; in dicta court adopted FRE §804(b)(3)).

(2) *United States v. Hulen*, 3 M.J. 275 (C.M.A. 1977) (exclusion of defense "expert" on interracial identification held proper as not based on demonstrable scientific principle).

(3) *United States v. Miller*, 3 M.J. 292 (C.M.A. 1977) (trial judge committed reversible error in refusing to admit evidence of alleged forcible sodomy victim's prior homosexual activity on issue of consent).

(4) *United States v. O'Berry*, 3 M.J. 334 (C.M.A. 1977) (trial judge committed reversible error by allowing trial counsel to impeach accused by eliciting that he was on probation).

(5) *United States v. Tomchek*, 4 M.J. 66 (C.M.A. 1977) (trial judge committed reversible error in admitting testimony as to accused's bad reputation for truth when witness had limited contact with community in which accused lived and worked.)

(6) *United States v. Nault*, 4 M.J. 318 (C.M.A. 1978) (suggesting that chain of custody receipts are principally prepared for prosecution and therefore inadmissible as business entries, N.7 at 320). *See Porter* and *Neutze*, *infra*.

(7) *United States v. Woolery*, 5 M.J. 31 (C.M.A. 1978) (military judge committed reversible error in rape prosecution by admitting evidence of prior rape offense on issue of consent).

(8) *United States v. Zone*, 7 M.J. 21 (C.M.A. 1979) (military judge committed reversible error by failing sua sponte to take necessary corrective action to prevent consideration by trier of fact of erroneously admitted prejudicial hearsay; failure to object not waiver).

(9) *United States v. Porter*, 7 M.J. 32 (C.M.A. 1979) (chain of custody receipt held to have been prepared principally for purposes of

prosecution and, therefore, inadmissible over defense objection; remaining evidence insufficient to establish admissibility of offered drugs).

(10) *United States v. Neutze,* 7 M.J. 30 (C.M.A. 1979) (absent an exception hearsay is incompetant as evidence under military practice; since the chain of custody receipt was prepared principally for purposes of prosecution, it was hearsay and the military judge should have excluded it even in the absence of a defense objection).

b. Statements of Co-Accused.

(1) *United States v. Pringle,* 3 M.J. 308 (C.M.A. 1977) (mere deletion of accused's name from co-accuseds' confessions insufficient to satisfy *Bruton*).

(2) *United States v. Green,* 3 M.J. 320 (C.M.A. 1977) (trial judge committed reversible error by not requiring prosecution to either forego use of co-accused's confession or move for severance).

c. Procedural Rules.

(1) *United States v. Kelson,* 3 M.J. 139 (C.M.A. 1977) (Uniform Rule 34 held inconsistent with para. 66*b*, MCM, and not promulgated by proper authority).

(2) *United States v. Thompson,* 3 M.J. 271 (C.M.A. 1977) (trial judge abused discretion in not granting continuance for psychiatric evaluation of accused).

(3) *United States v. Justice,* 3 M.J. 451 (C.M.A. 1977) (examination of sentence worksheet by trial judge and counsel prior to reading did not constitute announcement).

(4) *United States v. Stegall,* 6 M.J. 176 (C.M.A. 1979) (where multiplicious charging of accused is not justified by exigencies of proof, military judge should dismiss lesser offense on motion prior to plea or should disapprove findings of guilty as to lesser offense prior to sentencing).

(5) *United States v. Hitchchock,* 6 M.J. 188 (C.M.A. 1979) (military judge committed reversible error by reconsidering and withdrawing on his own motion the previous grant of a defense motion for a finding of not guilty even though formal "findings" not entered; announcement of ruling on motion in presence of the accused constituted announcement of findings which could not thereafter be reconsidered).

d. Trial by Judge Alone and Recusal.

(1) Request for trial by judge alone.

(a) *United States v. Ward,* 3 M.J. 365 (C.M.A. 1977) (whether to grant accused's request for trial by judge alone within discretion of trial judge; request properly denied after trial judge denied prosecution challenge for cause and determined denial of request for bench trial to be in best interests of justice).

(b) *United States v. Wright,* 5 M.J. 106 (C.M.A. 1978) (trial judge abused discretion in refusing to permit withdrawal of previously approved request for bench trial; court employed balancing test-reasons for request versus inconvenience to government).

(c) *United States v. Thorpe,* 5 M.J. 186 (C.M.A. 1978) (trial judge properly refused to permit withdrawal of previously approved request for bench trial based on balancing test employed in *Wright, supra*).

(d) *United States v. Parkes,* 5 M.J. 489 (C.M.A. 1978) (inquiry by military judge of accused whether he understood differences between bench and jury trials without specific recitation of differences held sufficient for military judge to determine that request for bench trial had been intelligently made).

(e) *United States v. Stegall,* 6 M.J. 176 (C.M.A. 1979) (failure of military judge to advise accused specifically of his right to enlisted membership on the court did not invalidate accused's request for a bench trial where accused affirmatively stated on the record that he understood the meaning and effect of his request for bench trial and where military judge's advice to the accused was otherwise complete).

(f) *United States v. Stearman,* 7 M.J. 13 (C.M.A. 1979) (indication of identify of military judge on written request for trial by military judge alone held not to be a jurisdictional prerequisite to a bench trial where record indicates that the accused was aware of judge's identity).

(2) Recusal.

(a) *United States v. Conley*, 4 M.J. 327 (C.M.A. 1978) (trial judge committed reversible error by failing to recuse himself upon defense challenged based upon his remarks that he would rely upon his remarks that he would reply upon his own expertise in making handwriting comparisons).

(b) *Wright, supra* (Perry, J., concurring at 111) (trial judge should have recused himself since he had been SJA of accused's command on dates offenses occurred, charges preferred and accused confined even through judge disavowed any prior participation in or knowledge of case).

4. Instructions.

a. *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977) (trial judge has sua sponte obligation to give limiting instruction on evidence of uncharged misconduct even if defense affirmatively requests the contrary). *But see United States v. Deford*, 5 M.J. 104 (C.M.A. 1978) (conviction affirmed even though trial judge failed to give limiting instruction on evidence of accused's prior conviction); and *United States V. James*, 5 M.J. 382 (1978) (failure or military judge to give limiting instruction held proper under facts).

b. *United States v. Groce*, 3 M.J. 369 (C.M.A. 1977) (defense failure to object or move for mistrial as a result of court member who "appeared" to be asleep during instructions held not to be waiver; trial judge has sua sponte obligation to act). *See also United States v. Brown*, 3 M.J. 368 (C.M.A. 1977).

c. *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977) (trial judge bears ultimate responsibility for sufficiency and accuracy of instruction; self-defense instruction held inadequate; Court refused to find waiver even though proposed instruction discussed with counsel and no objection asserted).

d. *United States v. Thompson*, 5 M.J. 28 (C.M.A. 1978) (curative instruction blaming temporary absence of defense witness on government and indicating absence not reflective of witness' credibility in response to remark of court member during recess held sufficient; denial of defense motion for mistrial held proper).

e. *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978) (where regulatory prohibition contained exception, trial judge committed reversible error by failing to instruct that members must find absence of exception beyond reasonable doubt in order to convict; absence of exception not an affirmative defense).

f. *United States v. Guilbault*, 6 M.J. 20 (C.M.A. 1978) (military judge misinstructed court as to maximum sentence; where accused charged with regulatory violation for offense not specifically listed in Table of Maximum Punishments but cognizable under either U.S. Code or District of Columbia Code, lesser of punishment prescribed in U.S. Code or District of Columbia Code controls if lesser than punishment prescribed for violation of Article 92).

g. *United States v. Waggoner*, 6 M.J. 77 (C.M.A. 1978) (specific reference by military judge to preliminary instructions in an earlier case constituted reversible incorporation of instructions outside record, prejudice presumed absent clear and convincing rebuttal such as guilty plea; while judge has discretion whether to give preliminary instructions, if instructions are given they should be proper and complete; absence of defense objection not waiver).

h. *United States v. Lee*, 6 M.J. 96 (C.M.A. 1978) (military judge not required to give accomplice testimony instruction sua sponte where *entire* prosecution case not based upon accomplice testimony; here testimony of accomplice not self-contradictory, uncertain or improbable and corroborated by pretrial statement of accused).

i. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979) (military judge committed reversible error in responding to request of court members that accused could not be called to testify; failure to give additional, specific cautionary instruction rendered response prejudicial comment on accused's failure to testify).

j. *United States v. Slaton*, 6 M.J. 254 (C.M.A. 1979) (military judge did not err in refusing to give model instruction on mental condition not amounting to a defense as a

mitigating factor where military judge instead instructed court to consider psychiatric report and statement of accused in adjuding a sentence).

k. *United States v. Jackson*, 6 M.J. 261 (C.M.A. 1979) (military judge in an attempted murder case committed reversible error by failing to instruct, sua sponte, on the lesser included offense of attempted voluntary manslaughter). *Accord, United States v. Staten*, 6 M.J. 275 (C.M.A. 1979).

l. *United States v. Smalls*, 6 M.J. 347 (C.M.A. 1979) (military judge properly refused to give specific voluntary intoxication instruction where the evidence failed to indicate the effect, if any, the intoxicant had upon the accused).

5. The Role of the Trial Judge Before and After Trial.

a. Before Trial.

United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978), and *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978), clarify and appear to preclude the exercise of any authority in a case by a trial judge prior to referral.

b. Post Trial Duties.

(1) *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977) (suggesting that trial judge may share responsibility for post trial representation of the accused).

(2) Authentication of record of trial.

(a) *United States v. Credit*, 4 M.J. 118 (C.M.A. 1977) (substitute authentication permitted only in emergency situation; geographical absence of trial judge not sufficient; record may not be authenticated by assistant trial counsel who was not present through proceedings).

(b) *United States v. Miller*, 4 M.J. 207 (C.M.A. 1977) (presence of trial judge at a duty station more than 48 hours mailing time away from trial situs insufficient cause to permit substitute authentication).

(c) *See also United States v. Groce, supra.*

B. The Roles of Other Participants in the Military Justice System.

1. The Judge Advocates General.

a. *United States v. McPhail*, 1 M.J. 457 (C.M.A. 1976).

b. *But see Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978).

2. The Courts of Military Review.

a. *United States v. Darville*, 5 M.J. 1 (C.M.A. 1978) (CMR's are without independent suspension authority).

b. *United States v. Scott*, 4 M.J. 205 (C.M.A. 1978) (CMR may order sentence suspended to effect convening authority's intended result in ambiguous action).

c. *United States v. Dukes*, 5 M.J. 71 (C.M.A. 1978) (excercise of fact finding and sentence reassessment authority by CMR's subject to review as a matter of law by C.M.A.).

3. Military Magistrate.

United States v. Malia, 6 M.J. 65 (C.M.A. 1978) (brigade commander without authority to reverse earlier erroneous decision of the military magistrate releasing accused from pretrial confinement; ABA Standards, Pretrial Release adopted, military magistrate required to make periodic reconsideration of decision on own motion, upon application of accused or upon request of command; due process requires that magisterial review of pretrial confinement be prompt, while hearing in form of adversary proceeding unnecessary and accused need not be represented by counsel before magistrate, any ex parte communication between magistrate and command after appointment of counsel to represent accused is prohibited).

4. Article 32 Investigating Officer.

a. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (improper for trial counsel to render legal advice to Investigating Officer; ABA Standards applied to Investigating Officer; Court criticized use of lay Investigating Officer).

b. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978) (while accused has a right to strict compliance with pretrial procedures

without regard to prejudice, where material civilian witnesses declined to testify at Article 32, counsel must move to depose witnesses to preserve issue).

c. *United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978) (counsel must make timely objection at trial in order to preserve any error in government's failure to produce military witness at pretrial investigation).

d. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979) (accused not denied a pretrial investigation by an impartial investigating officer where in response to evidence that accused had threatened a witness, Investigating Officer threatened to prefer charges against the accused if any future threats occurred; rather Investigating Officer was merely fulfilling duty to protect witnesses and maintain order).

5. Duties of Defense Counsel.

a. *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977).

b. *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977).

c. *United States v. Davis*, 3 M.J. 430 (C.M.A. 1977) (multiple representation, *supra*).

d. *United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978).

e. *United States v. Webb*, 5 M.J. 406 (C.M.A. 1978) (argument of DC for suspended punitive discharge after accused indicated in testimony a desire to remain on duty constituted improper concession of sentence to a discharge since military judge without authority to suspend).

f. *United States v. Davis*, 5 M.J. 451 (C.M.A. 1978) (post trial representation of substitute counsel who waived *Goode* rebuttal without contacting accused or trial defense counsel held inadequate).

6. Trial Counsel.

a. *United States v. Johnson*, 4 M.J. 8 (C.M.A. 1977) (agreement by trial counsel to testify on behalf of key government witness at subsequent trial imputed to SJA and constituted pretrial judgment of credibility thereby disqualifying staff judge advocate from reviewing case).

b. *United States v. Whitehead*, 5 M.J. 294 (C.M.A. 1978) (N. 1 at 294 citing *United States v. Varacalle*, 4 M.J. 181 (C.M.A. 1978) indicates that trial counsel may properly list deterrence as one of the factors to be considered by the sentencing authority). *But see United States v. Ludlow*, 5 M.J. 411 (C.M.A. 1978), *pet. for reconsid. denied*, 6 M.J. 129 (C.M.A. 1978).

7. The Staff Judge Advocate.

a. *United States v. Morrison*, 3 M.J. 408 (C.M.A. 1977) (defense failure to object to error in post trial review constitute waiver) (Fletcher, C.J., in concurring opinion characterizes SJA as "chief Prosecutor" and suggests use of an abbreviated post trial review).

b. *United States v. Johnson*, 4 M.J. 8 (C.M.A. 1977), *supra*.

c. *United States v. Harrison*, 5 M.J. 34 (C.M.A. 1978) (improper for SJA to advise convening authority in BCD SPCM review of the maximum imposable punishment based upon conviction by GCM).

d. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979) (where pretrial advisor misstakes law or fact in pretrial advice, advisor is disqualified from preparing the post trial review; however, even though attacked at trial, where advice is materially correct in law and fact, advisor is not disqualified from acting as post trial reviewer; trial judge should render special findings where pretrial advice is attacked).

8. The Convening authority.

a. *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977) (superior commander may not *direct* subordinate convening authority to withdraw and forward previously referred charges; reasons for withdrawal must appear as matter of record in all cases).

b. *United States v. Malia*, 6 M.J. 65 (C.M.A. 1978) (brigade commander without authority to reverse earlier erroneous decision of military magistrate releasing accused from pretrail confinement).

c. *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979) (convening authority abused discretion in denying accused's request for deferment of sentence; ABA Standard, Criminal Appeals §2.5(b) adopted into military practice to govern exercise of discretion on requests for deferment).

d. Composition of Court.

(1) *United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1978) (language of Articles 26 and 27 held prescriptive, personal selection of military judge and counsel by convening authority is a condition precedent to court's jurisdiction).

(2) *United States v. Ware*, 5 M.J. 24, 25 (C.M.A. 1978) (oral modification of convening order issue, "This is an insufficient treatment of yet another jurisdictional problem caused as a direct result of apparently indifferent discharge of the simplest and most basic administrative duty of those responsible for the military courtmartial, *i.e.*, properly prepared convening orders and attendant modifications").

(3) *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978) (jurisdiction of court to proceed by judge alone does not survive defect in appointment of members) (*but see* N. 5 at 101 suggesting that the covening authority need not personally select counsel).

(4) *United States v. Mixson*, 5 M.J. 236 (C.M.A. 1978) (rule announced in *Newcomb, supra*, applied prospectively only to cases "convened" after 1 May 1978).

(5) *United States v. Lamela*, 6 M.J. 32 (C.M.A. 1978) (earlier grant of issue challenging constitutionality of court-martial composed of only 5 members (6 M.J. 11) vacated as improvidently granted).

e. Matters Provided to the Convening Authority Prior to Action.

(1) *United States v. Harrison, supra* (convening authority improperly advised of standard for clemency).

(2) *United States v. Knecht*, 5 M.J. 291 (C.M.A. 1978) (memo from former SJA explaining unusual post trial processing and containing adverse information pertaining to accused presumed not to have been used for any improper purpose).

C. The Role of the Court of Military Appeals.

1. General.

a. *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976).

(1) USAF TJAG ordered to vacate findings and sentence of regular SPCM based upon serviceconnection issue.

(2) "[T]his Court is the supreme court of the military justice system," at 462.

(3) "[A]s to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority," at 463.

b. *Whitfield v. United States*, 4 M.J. 289 (C.M.A. 1978) (accused's involuntary participation in training program at USARB beyond minimum release date held to be an unlawful extension of sentence).

c. *But see:*

(1) *Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977).

(2) *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978).

2. C.M.A.'s Rule-Making Authority.

a. The Manual for Courts-Martial.

(1) *United States v. Heard*, 3 M.J. 14 (C.M.A. 1977) (para. 20c MCM, held beyond President's authority under Article 36; new pretrial confinement standards adopted).

(2) *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977) (para. 120b, MCM, held beyond President's authority under Article 36; ALI standard for mental responsibility adopted). *(see United States. v. Santiago-Vargas*, 5 M.J. 41 (C.M.A. 1978), wherein Court refused to adopt "pathological intoxication").

(3) *See also* separate opinions of Fletcher, C.J., and Cook, J., in *United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1978).

(4) *United States v. Ezell*, 6 M.J. 307

(C.M.A. 1979) (while para. 152, MCM, may arguably be beyond the President's authority under Article 36, it is a proper exercise of the President's authority under Article II of the Constitution).

b. Regulations.

(1) *United States v. Kelson*, 3 M.J. 139 (C.M.A. 1977) (Uniform Rules of Court not promulgated by proper authority).

(2) *United States v. Hutchins*, 4 M.J. 190 (C.M.A. 1978) (R 635-200 held not to defeat *in personam* jurisdiction under Article 2(1) in case where individual held beyond ETS for trial; regulation must be interpreted to be consistent with statute).

(3) *United States v. Barton*, 6 M.J. 16 (C.M.A. 1978) (Coast Guard regulation permitting use of videotape "records" not properly authorized by President or Congress).

c. Other Rule-Making.

(1) *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977) (prosecution failed to establish service connection over off post drug offense; adopted rule requiring jurisdictional facts to be alleged and proven).

(2) *United States v. Booker*, 3 M.J. 433 (C.M.A. 1977) republished at 5 M.J. 238.

(3) *United States v. Cannon*, 5 M.J. 198 (C.M.A. 1978) (*Booker* rules applied only to cases to be tried or retried after 11 Oct 1977).

(4) *United States v. Jackson*, 5 M.J. 223 (C.M.A. 1978) (accused not prejudiced by absence of appointed counsel for 42 days of pretrial confinement but Court indicated it expected counsel to be appointed at early stage in process).

(5) *United States v. Booker*, 5 M.J. 246 (C.M.A. 1978) (opinion on reconsideration).

(6) *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979) (ABA Standard, Criminal Appeals §2.5(b) adopted to govern exercise of discretion by the convening authority.

(7) *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979) (dicta in *Booker* as to foundation required for admissibility of Article 15's in sentencing made holding).

D. Protecting Individual Rights of the Accused.

1. Speedy Trial and Review.

a. *Burton Cases.*

(1) *United States v. Henderson*, 1 M.J. 421 (C.M.A. 1976) (murder charge dismissed on basis that government did not adequately explain 113-day delay).

(2) *United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977) (delay of 150 days to bring accused to trial for murder determined reasonable based on government's need to try essential coactor/witness first).

(3) *United States v. Leonard*, 3 M.J. 214 (C.M.A. 1977) (delay occasioned by defense requested psychiatric examination excluded from government accountability).

(4) *United States v. cole*, 3 M.J. 220 (C.M.A. 1977) (delay beyond 90 days held reasonable based on extraordinary circumstances; but court indicated that only defense requested delay actually affecting government processing of case was excludable).

(5) *United States v. Herron*, 4 M.J. 30 (C.M.A. 1977) (portion of delay occasioned by defense repudiation of prior waiver of Article 32 investigation excluded from government accountability).

(6) *United States v. Nash*, 5 M.J. 37 (C.M.A. 1978) (periods of confinement resulting from wholly unrelated misconduct excluded from government accountability).

(7) *United States v. Nelson*, 5 M.J. 189 (C.M.A. 1978) (13-day initial period of confinement in 205-day processing of case held not significant; no triggering of Article 10 protection; accused not prejudiced by violation of Article 33).

(8) *United States v. Rachels*, 6 M.J. 232 (C.M.A. 1979) (retention beyond ETS not tantamount to arrest, absent specific prejudice, no denial of speedy trial).

b. *Dunlap* Cases.

(1) *United States v. Bryant*, 3 M.J. 396 (C.M.A. 1977) (unusual delay in mails in delivery of post trial review to defense counsel for

Goode comment excluded from government accountability).

(2) *United States v. Jackson,* 6 M.J. 261 (C.M.A. 1979) (C.M.A. granted review on a 91-day *Dunlap* issue but affirmed conviction in part without even mentioning issue).

(3) *United States v. Lucy,* 6 M.J. 265 (C.M.A. 1979) (C.M.A. approved N.C.M.R. direction of limited rehearing to determine cause of 91-day post trial delay; *Dunlap* issue dismissed without discussion).

2. Jurisdiction.

a. Service Connection.

(1) *United States v. Alef,* 3 M.J. 414 (C.M.A. 1977) (off post drug sale to service member/informant not service-connected; violations of general regulation not per se service-connected; analysis of *Relford* factors required; jurisdictional facts must be alleged and proven at trial).

(2) *United States v. Hopkins,* 4 M.J. 260 (C.M.A. 1978). (Off-post larcenies perpetrated through the use of a falsified military identification held not service-connected).

(3) *United States v. Williams,* 4 M.J. 336 (C.M.A. 1978) (off-post larceny by trick resulting from an on-post scheme to sell counterfeit drugs held not service-connected).

(4) *United States v. Whatley,* 5 M.J. 39 (C.M.A. 1978) (off-post larceny held service-connected where accused used his duty position to gain information that fellow military policeman victim would be on duty and absent from sites of larceny).

(5) *United States v. Smith,* 5 M.J. 129 (C.M.A. 1978) (off-post accessorial involvement in an off-post larceny resulting from an on-post conspiracy held not service-connected).

(6) *United States v. Saulter,* 5 M.J. 281 (C.M.A. 1978) (off-post drug transactions between accused and fellow military policemen held not service-connected).

(7) *United States v. Klink,* 5 M.J. 404 (C.M.A. 1978) (possession, transfer and sale of marijuana by accused to fellow soldier occurring on an island completely surrounded by fort Belvoir and within 10 yards of the military installation not service-connected).

(8) *United States v. Kimbrough,* 5 M.J. 458 (C.M.A. 1978) (citing *Beeker,* importation of controlled substance into the United States from outside the United States held not service-connected).

(9) *United States v. Doyle,* 6 M.J. 119 (C.M.A. 1979) (off-post purchase of marijuana not service-connected).

(10) *United States v. McCollum,* 6 M.J. 224 (C.M.A. 1979) (charged off-post drug offense stemming from uncharged on-post conspiracy held not service-connected).

(11) *United States v. Conn,* 6 M.J. 351 (C.M.A. 1979) (off-post possession and use of marijuana by accused military police officer in the presence of civilians and enlisted subordinates held not service-connected).

(12) *United States v. Chambers,* 7 M.J. 24 (C.M.A. 1979) (off-post drug transaction to known military transferee whom accused knew intended to resell drugs on-post held service-connected).

b. Jurisdiction Over Person.

(1) Retention Beyond ETS or Date of Release from AD.

(a) *United States v. Peel,* 4 M.J. 28 (C.M.A. 1977) (no jurisdiction over national guardsman held beyond date specified in orders without state approval).

(b) *United States v. Hutchins,* 4 M.J. 190 (C.M.A. 1978) (jurisdiction under Article 2(1) continued beyond ETS when accused not actually discharged and failed to object, even though retention may have been irregular).

(c) *United States v. Smith,* 4 M.J. 265 (C.M.A. 1978) (jurisdiction terminated on date of self-executing separation orders where no official action toward trial prior to separation date).

(d) *United States v. Hudson,* 5 M.J. 413 (C.M.A. 1978) (extension of accused reservist's time of service to complete MOS training in conformity of regulation; restriction of accused to unit area and notification by commander of pending criminal investigation prior to effective date of self-executing release orders sufficient official, authoritative action to

cause continuation of military jurisdiction beyond effective date of release orders).

(e) *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979) (jurisdiction over person does not terminate by mere expiration of term of service; here apprehension prior to ETS was sufficient affirmative action to cause continuation of jurisdiction even through ETS was not administratively adjusted until after the fact).

(2) Involuntary Activation

United States. Barraza, 5 M.J. 230 (C.M.A. 1978) (jurisdiction existed over "lazy reservist" who failed to make timely objection to irregularities in involuntary activation).

(3) "Forced Volunteer."

(a) *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978) (jurisdiction existed where accused "bargained" enlistment in state criminal proceedings; accused not a "forced volunteer" and no recruiter misconduct).

(b) *United States v. Wagner*, 5 M.J. 461 (C.M.A. 1978) (jurisdiction existed where defense counsel in state criminal proceeding bargained for enlistment in lieu of prosecution prior to conviction in accordance with standing policy of prosecuting attorney; accused not a "forced volunteer" within the meaning of *Catlow*).

(4) Recruiter Misdonduct and Void, Voidable and Constructive Enlistments.

(a) *United States v. Wagner, supra.* (Constructive enlistment cannot exist where regulatory disqualification continues to exist; no recruiter misconduct where no deliberate regulatory violation by recruiter or actual knowledge of regulatory disqualification; enlistment of accused who concealed a nonwaivable regulatory disqualification not involving insantity, idiocy or infancy held *voidable* only; jurisdiction exists absent timely disclosure and request for release).

(b) *United States v. Valdez*, 5 M.J. 470 (C.M.A. 1978) (voluntary enlistment of unqualified accused as a result of *simple negligence* of recruiter *voidable* only; where recruiter violates Article 84, U.C.M.J., enlistment void *ab initio* as a matter of congressionally expressed public policy; simple negligence of recruiter in violation of Article 92(3) not violative of public policy; constructive enlistment unavailable where regulatory disqualification continues; jurisdiction exists over voidable enlistment absent timely request for release) (*Note:* Court expressly refused to decide whether gross or willful negligence of recruiter would violate public policy and defeat jurisdiction.)

(c) *United States v. Harrison*, 5 M.J. 476 (C.M.A. 1978) (enlistment of a 16-year-old accused is void *ab initio;* however, jurisdiction found to exist over accused through doctrine of constructive enlistment where accused voluntarily continued to serve after reaching age 17 absent timely disclosure or request for release from accused or parents; doctrine of constructive enlistment available only where government has not acted unfairly in effecting original invalid enlistment; government must follow its own regulations in order to claim constructive enlistment).

3. Statute of Limitations.

United States v. Arsneault, 6 M.J. 182 (C.M.A. 1979) (statute of limitations not tolled even though earlier charge sheet reflecting preferred charge received by SCMCA prior to running of period where new charge sheet prepared rather than simple amendment of prior charge sheet and charge re-preferred after running of period).

4. Offenses.

a. *United States v. Cummings*, 3 M.J. 246 (C.M.A. 1977) (false statement to NCO having no official duty as to subject matter of statement not a violation of Article 107).

b. *United States v. Johnson*, 3 M.J. 361 (C.M.A. 1977) (unofficial forcible abduction not an unlawful apprehension within the meaning of Article 97).

c. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978) (assimilation of Texas burglary of automobile statute under 18 U.S.C. §13 not preempted by Articles 129 and 130).

d. *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978) (Article 125 not unconstitutionally vague; Article 125 facially and as applied to homosexual contact in barracks bay not violative of right of privacy, homosexual fellatio

within scope of prohibition of Article 125).

e. *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978) (regulation prohibiting wearing of "short hair" wigs except for cosmetic reasons held constitutional).

f. *United States v. Staten*, 6 M.J. 275 (C.M.A. 1979) (assault with intent to inflict "great" bodily harm no longer an offense under the UCMJ and not cognizable by Article 134).

5. Right to Counsel.

a. Pretrial Representation.

(1) *United States v. Hill*, 5 M.J. 114 (C.M.A. 1978) (assertion of right to counsel at first interview determined to have been "eroded" and not voluntarily waived at second interview).

(2) *United States v. Turner*, 5 M.J. 148 (C.M.A. 1978) (counsel held to have asserted client's right to counsel at first interview and resulting statement inadmissible; but client waived counsel at second interview and resulting statement admissible).

(3) *United States v. Jackson*, 5 M.J. 223 (C.M.A. 1978) (failure to appoint detailed counsel upon request during 42-day period of pretrial confinement "potentially prejudicial" but error waived by counsel who stated on record that he was prepared to proceed).

b. Representation at Trial.

(1) *United States v. Kelker*, 4 M.J. 323 (C.M.A. 1978) (appellate counsel properly determined unavailable to represent accused at rehearing).

(2) *United States v. Rachels*, 6 M.J. 232 (C.M.A. 1979) (U.S.M.C. judiciary policy of prohibiting trial judges from appearing as defense counsel constitute "good cause" to sever prior existing attorney-client relationship when counsel was reassigned duties as full-time trial judge prior to trial).

(3) *United States v. Schmidt*, 7 M.J. 15 (C.M.A. 1979) (held no error for military judge to conduct an Article 39(a) session in absence of the defense counsel for the purpose of determining whether the accused desired to await counsel's return from emergency leave or to request appointment of another counsel).

c. Post Trial Representation.

(1) *United States v. Hill*, 3 M.J. 295 (C.M.A. 1977) (accused entitled to counsel at post trial interview).

(2) *United States v. Annis*, 5 M.J. 344 (C.M.A. 1978) (substitution of counsel for *Goode* comment waived by accused under facts).

(3) *United States v. United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978) (service of post trial review for *Goode* rebuttal on counsel other than trial defense counsel without consent of accused improper; "Absent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level" (at 442-3, footnotes omitted)).

(4) *United States v. Davis*, 5 M.J. 451 (C.M.A. 1978) (post trial representation of substitute counsel held inadequate where substitute counsel waived *Goode* rebuttal without contacting trial defense counsel or accused).

(5) *United States v. Brown*, 5 M.J. 454 (C.M.A. 1978) (substitute counsel appointed to replace absent trial defense counsel who was undergoing in-patient treatment for alcoholism held to have act without authority where record failed to indicate contact between accused and substitute counsel and formation of attorney-client relationship; Court expressly refused to decide issue of availability of trial defense counsel).

6. Witnesses and Discovery.

a. Witnesses.

(1) Materiality.

(a) *United States v. Jouan*, 3 M.J. 136 (C.M.A. 1977) (witness material even though testimony similar to another present witness whose credibility was in issue).

(b) *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977) (where accused's credibility was in issue accused entitled to reasonable representative sampling of character witnesses on merits; determination of materiality/cumulative nature of testimony within discretion of trial

judge).

(c) *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978) (denial by military judge of three out of four defense-requested character witnesses on sentencing only, who were all former commanders of the accused whose testimony was generally similar and whose credibility was unchallenged held proper).

(2) Burden to establish materiality. *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978) (defense has burden to establish materiality of testimony of defense witnesses).

(3) Remedy for failure to produce material witness. Usual remedy reversal/abatement of proceedings, but in *Lucas, supra*, Court refused to reverse since witness' prior statement was included in record and testimony was insufficient as a matter of law to alter result.

(a) *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978) (where two material government witnesses declined to appear at Article 32 investigation and thus sworn statements were considered over objection, counsel's failure to make timely motion to depose witnesses waived issue).

(b) *United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978) (where defense requested presence of material government witness at Article 32 investigation but failed to renew motion at trial, Article 32 right merged with cross-examination right at trial).

(c) *United States v. Scott*, 5 M.J. 431 (C.M.A. 1978) (sentence reassessment by N.C.M.R. for erroneous failure by military judge to order production of material defense witness held inadequate; rehearing required).

(d) *United States v. Cumberledge*, 6 M.J. 203 (C.M.A. 1979) (improper failure to produce material witnesses at Article 32 hearing or to provide a meaningful substitute for presence did not require reversal of trial judge's ruling as to adequacy of Article 32 investigation where defense counsel had actual access to witnesses prior to trial; attempted denial of access to witnesses by prosecution prior to trial improper but not prejudicial under facts).

b. Discovery.

(1) *United States v. Lucas, supra* (government under no obligation to obtain statements from or secure presence of potential defense witnesses for pretrial preparation of defense).

(2) *United States v. Chuculate, supra* (defense must move to depose unavailable witnesses at Article 32 investigation or discovery rights will be waived).

(3) *United States v. Cruz, supra.*

(4) United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978) (conviction reversed where government unable to produce routinely destroyed raw notes of investigative agent which had been adopted by witness/informant).

(5) *United States v. Horsey*, 6 M.J. 112 (C.M.A. 1979) (reversal under *Brady v. Maryland* not required where prosecution unable to produce results of "suspicious" pretrial identification procedures in response to defense request since evidence involved neither favorable to accused nor material).

(6) *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979) (where the government purports to act under an applicable but classified regulation, military judge cannot satisfy the accused's right to inspect the regulation by examining it *in camera;* however, here, classified electronic surveillance regulation inapplicable to facts of case and, therefore, irrelevant).

7. Self-Incrimination/Article 31.

a. *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977) (defense interrogation of psychiatrist-witness as to statements of accused waived objection to similar interrogation by prosecution).

b. *United States v. Noel*, 3 M.J. 328 (C.M.A. 1977) (prosecution unlawfully presented evidence of accused's silence upon apprehension to rebut exculpatory testimony at trial).

c. *United States v. Smith*, 4 M.J. 210 (C.M.A. 1978) (order to perform training held not to violate Article 31 even though performance confirmed accused was malingering).

d. *United States v. Hill*, 5 M.J. 114 (C.M.A. 1978) (*see* Right to Counsel, *supra).*

e. *United States v. Turner* (*see* Right to Counsel, *supra*).

f. *United States v. Annis*, 5 M.J. 351 (C.M.A. 1978) (where witness testified that he "read his rights" to accused without specific explanation, absent defense objection at trial compliance with Article 31 presumed and resulting admission admissible).

g. *United States v. Hofbauer*, 5 M.J. 409 (C.M.A. 1978) (para. 140*a*(2), MCM, illustrative only; where FBI agent acting in concert with CID advised military accused in custody in compliance with *Miranda* but omitted any mention of individual military counsel or appointed military counsel without regard to accused's ability to retain private counsel held sufficient; resulting statements of accused admissible).

h. *United States v. Quintana*, 5 M.J. 485 (C.M.A. 1978) (inculpatory statements made to separate law enforcement officials in subsequent non-custodial interrogation after proper warning held not to have been tainted by earlier interrogation at which accused had been improperly advised of right to counsel where accused made no incriminating statements; assertion of right to counsel at first interrogation did not prevent subsequent interrogation without counsel nearly a month later where accused failed to keep appointment with counsel during interim and where no attorney-client relationship ever created since later interrogation properly warned and right voluntarily waived).

i. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979) (remarks of military judge in response to request from court members that accused could not be called to testify without additional, specific cautionary instructions constituted prejudicial comment on accused's failure to testify).

j. *United States v. Milliken*, 6 M.J. 210 (C.M.A. 1979) (trial counsel properly cross-examined accused as to contents of a pretrial statement to CID without first laying foundation of voluntariness where accused testified on direct that his "story" had been consistent "all along").

k. *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) (failure of German police to comply with Article 31b and *Miranda/Tempia* did not render inadmissible an otherwise voluntary statement of an accused where interrogation conducted solely for the benefit of FRG in a USACID office with no American personnel present; American officials under no obligation to warn a service member before releasing custody to a foreign government).

l. *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979) (Article 31 found specifically to be inapplicable to E&M hearings except where evidence could be produced that would give rise to a charge being laid to a different crime; questioning of accused as to *Booker* foundation for admissibility of a prior Article 15 by military judge held proper).

8. Search and Seizure.

a. *United States v. Hessler*, 4 M.J. 303 (C.M.A. 1978), opinion on reconsideration, 7 M.J. 9 (C.M.A. 1979) (uninvited and unauthorized entry of duty officer into barracks room after smelling burning marijuana held reasonable).

b. *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1977) (gate search at overseas installation held reasonable).

c. *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978) (CONUS installation gate search held unreasonable where gate guard exercised independent discretion in stopping vehicles).

d. *United States v. Grosskreutz*, 5 M.J. 344 (C.M.A. 1978) (use of marijuana detection dog in parking lot not a search; accused has no reasonable expectation of privacy over odors emanating from marijuana in POV; resulting search authorized by installation commander based on probable cause, *i.e.*, dog's alert).

e. *United States v. Robinson*, 6 M.J. 109 (C.M.A. 1979) (mere flight of entering pedestrian from "consent search" spot-check at gate by MP coupled with unconfirmed report that pedestrian was "connected with" illict drug traffic insufficient for investigative stop or probable cause to apprehend; where MP decided to effect apprehension before obtaining sufficient information to support probable

cause, resulting apprehensions and incidental search unlawful even though sufficient information became available during pursuit of pedestrian-accused; contraband discarded by accused during unlawful pursuit not abandoned).

f. *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (para. 152, MCM, within President's authority under Article II of the Constitution; a commander is not *per se* disqualified from acting as a neutral and detached magistrate for purposes of authorizing searches and seizures; however, if the commander contemporaneously acts as a police agent the commander is disqualified from acting as a neutral and detached magistrate; mere prior knowledge of facts or other acts of misconduct will not render a commander a police agent; if a commander participates in gathering information to establish probable cause, approves or directs the use of informants, approves or directs the use of detection dogs or otherwise approves or directs controlled buys, surveillance operations or similar activities or if the commander is present at the scene of the authorized search the commander will be deemed a police agent). (In his concurring opinion Fletcher, C.J., announced that in future cases he will consider the failure of a commander to refer a search authorization question to a military judge or magistrate on the issue of reasonableness of the resulting search).

g. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979) (accused had no reasonable expectation of privacy as to conversation associated with transfer of controlled substance in barracks hallway; covertly obtained tape of conversation admissible; USAF regulation pertaining to electronic eavesdropping irrelevant).

9. Right to a Jury Trial.

a. *United States v. Lamela*, 6 M.J. 32 (C.M.A. 1978) (earlier grant of issue challenging constitutionality of court-martial composed of only 5 members (6 M.J. 11) vacated as improvidently granted).

b. *United States v. Colon*, 6 M.J. 73 (C.M.A. 1978) (military judge committed reversible error by proceeding to trial with only 6 of 10 detailed members present without first notifying convening authority for excusal of absent members; error not jurisdictional since quorum present but statutory requirement that convening authority not military judge detail basic membership of court constitutes substnatial due process right of accused; absence of defense objection not waiver).

10. Sufficiency of Evidence and Burden of Proof.

a. Sufficiency of Evidence.

United States v. Wilson, 6 M.J. 214 (C.M.A. 1979) (test for sufficiency of evidence on appeal is whether there is some evidence of record from which trier of fact was entitled to find beyond reasonable doubt the existence of each element of the found offense).

b. Burden of Proof.

(1) *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978) (in dicta Judge Perry opined that in a prosecution for a regulatory violation, if the regulation involved provides an exception, presence of the except circumstance is *not* an affirmative defense, rather the prosecution has the burden of coming forward, as part of its prima facie case, with evidence establishing absence of the excepted circumstance beyond reasonable doubt).

(2) *United States v. Sablan*, 6 M.J. 141 (C.M.A. 1979) (citing *Verdi*, it was unfair shifting of the burden of proof to the defense for prosecution to offer evidence tending to establish that after apprehension of accused by CID the series of rape offenses which were the subject of prosecution ceased; however, under the circumstances the error was harmless).

(3) *United States v. Wilson*, 6 M.J. 214 (C.M.A. 1979) (where prosecution offered no evidence as to reliability of the informant providing information to support apprehension which became the basis of the charged offense, failure to object constituted waiver of issue of lawfulness of the apprehension) (Perry, J., dissented citing *Verdi* on grounds that majority had unlawfully shifted burden to defense).

11. Sentencing.

a. Equal Protection.

(1) *United States v. Jackson*, 3 M.J. 101 (C.M.A. 1977) (*Courtney* applied prospectively only; Court suggested that equal protection standard applied to military as a whole).

(2) *United States v. Hoesing*, 5 M.J. 355 (C.M.A. 1978) (equal protection suggestion in *Jackson* overruled; Congress intended each service to be separately regulated by respective service Secretary). *Accord, United States V. Thurman, infra.*

(3) United States v. Thurman, 7 M.J. 26 (C.M.A. 1979) (USAF regulation requiring non-narcotic dangerous drug offenses to be charged as regulatory violations under Article 92 rather than the less severe charge under Article 134, crimes and offenses not capital, denied accused equal protection; but under facts error was harmless).

b. Deterrence.

(1) *United States v. Varacalle*, 4 M.J. 181 (C.M.A. 1978) (affirmed trial judge who had considered general deterrence in adjuding sentence).

(2) *United States v. McCree*, 4 M.J. 277 (C.M.A. 1978) (trial counsel permitted to argue general deterrence). *Accord, United States v. Whitehead*, 5 M.J. 294 (C.M.A. 1978). *Contra, United States v. Ludlow*, 5 M.J. 411 (C.M.A. 1978), *pet. for reconsideration denied*, 6 M.J. 129 (C.M.A. 1978).

(3) *United States v. Milliken*, 6 M.J. 210 (C.M.A. 1979) (general deterrence argument of trial counsel held harmless error in view of Secretary of the Army clemency action).

c. Multiplicity and Maximum Punishment.

(1) *United States v. Irving*, 3 M.J. 6 (C.M.A. 1978) (solicitation and transfer of heroin separately punishable since no unity of time and place, but transfer and possession of amount retained by accused after transfer multiplicious).

(2) *United States v. Waller*, 3 M.J. 32 (C.M.A. 1977) (simultaneous possession and sale of PCP multiplicious).

(3) *United States v. Harrison*, 4 M.J. 332 (C.M.A. 1978) (wrongful appropriation and false official record cover-up not multiplicious; no unity of time and no use of false record to accomplish taking).

(4) *United States v. Guilbault*, 6 M.J. 20 (C.M.A. 1978) (military judge misinstructed court as to maximum sentence; where accused charged with regulatory violation for offense not specifically listed in Table of Maximum Punishments but cognizable under either U.S. Code or District of Columbia Code, lesser of punishment prescribed in U.S. Code or District of Columbia Code controls if lesser than punishment prescribed for violation of Article 92). *Accord, United States v. Thurman*, 7 M.J. 26 (C.M.A. 1979).

(5) *United States v. Stegall*, 6 M.J. 176 (C.M.A. 1979) (where exigencies of proof did not justify multiplicious charging of accused (here serious offense and its lesser included offense) military judge should have dismissed lesser offense prior to plea or sentence; however, since military judge properly treated the offenses as multiplicious in adjudging sentence, lesser offense could properly be dismissed on appeal without reassessment of sentence).

(6) *United States v. Bashaw*, 6 M.J. 179 (C.M.A. 1979) (any error by military judge in failing to treat several drug offenses as multiplicious for sentencing was purged by the convening authority's reassessment of the adjudged sentence based upon the erroneous understatement of the maximum imposable punishment in the post trial review of the staff judge advocate).

d. Evidence.

(1) *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977) republished at 5 M.J. 238.

(2) *United States v. Dukes*, 5 M.J. 71 (C.M.A. 1978) (consideration of record of Article 15 which failed to state an offense by trial judge constituted reversible error).

(3) *United States v. Cannon*, 5 M.J. 198 (C.M.A. 1978) (*Booker* perspective only; applied to cases "convened" after 11 Oct. 77).

(4) *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979) (*Booker* dicta relating to admissibility of Article 15's established as holding).

e. Procedure.

(1) *United States v. Jones*, 3 M.J. 348 (C.M.A. 1977) (reconsideration of sentence by members with a view of substituting a BCD for previously announced UD held improper).

(2) *United States v. Justice*, 3 M.J. 451 (C.M.A. 1977) (examination of sentence worksheet by trial judge and counsel did not constitute announcement).

(3) *United States v. Hendon*, 6 M.J. 171 (C.M.A. 1979) (erroneous and unnecessary misstatement of percentage of concurrence in sentence as "three-fourths" rather than "two-thirds" did not support an inference that court had misapplied proper instructions of the military judge and had, therefore, improperly rejected a more lenient sentence proposal; erroneous announcement did not affect validity of sentence announced).

f. Requests for Deferment of Sentence.

(1) *Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977) (C.M.A. refused collateral review of the denial of the accused's request for deferment of sentence where direct review would ultimately be available).

(2) *United States v. Sitton*, 5 M.J. 394 (C.M.A. 1978) (C.M.A. refused to grant direct review of the denial of the accused's request for deferment on the grounds that the issue was moot since the sentence to confinement had been served).

(3) *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979) (convening authority abused discretion in denying accused's request for deferment since there was no likelihood of flight, commission of additional serious offenses or obstruction of justice; C.M.A. adopted ABA Standards, Criminal Appeals §2.5(b) into military practice; relief denied since sentence to confinement had been served).

g. Clemency

United States v. Harrison, 5 M.J. 34 (C.M.A. 1978) (error for SJA in review of BCD SPCM to advise convening authority as to a maximum imposable punishment in excess of the jurisdictional limitation of the court).

h. Vacation of Suspension.

(1) *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977) (before vacating suspension of BCD, hearing must be conducted by SPCM convening authority personally and GCM convening authority must make written record of evidence relied upon and reasons for vacation). *Accord*, *United States v. Hurd*, 7 M.J. 18 (C.M.A. 1979).

(2) *United States v. Rozycki*, 3 M.J. 127 (C.M.A. 1977) (pending vacation proceedings toll period of suspension but must be completed within a reasonable time).

i. Administration of Sentence.

(1) *United States v. Robinson*, 3 M.J. 65 (C.M.A. 1977) (restricting accused in retraining program at Lowry Air Force Base beyond minimum release date constituted an unlawful extension of the adjudged sentence).

3) (2) *Whitefield v. United States*, 4 M.J. 289 (C.M.A. 1978) (program at USARB, Fort Riley, constituted an unlawful extension of the adjudged sentence).

12. Record of Trial.

United States v. Barton, 6 M.J. 16 (C.M.A. 1978) (videotape of proceedings held not to be a "verbatim record;" written or printed record required to qualify as "verbatim;" Coast Guard regulations permitting videotape "records" not authorized by President or Congress).

13. Post Trial Rights.

a. Post Trial Right to Counsel. *See* Right to Counsel, Post Trial Representation, *supra*.

b. Goode Cases.

(1) *United States v. Barnes*, 3 M.J. 406 (C.M.A. 1977) (alleged defect in post trial review waived by failure to challenge review in *Goode* response).

(2) *United States v. Morrison*, 3 M.J. 408 (C.M.A. 1977) (any ambiguity in summarization of testimony in post trial review waived by counsel's failure to raise issue in *Goode* response).

(3) *United States v. Harrison*, 5 M.J. 34 (C.M.A. 1978) (improper for SJA to respond to *Goode* comment requesting clemency in BCD SPCM by advising GCM convening authority of maximum imposable sentence in excess of jurisdictional limit of court).

(4) *United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978) (counsel entitled to a copy of record of trial in preparation of *Goode* response).

c. *United States v. Vick*, 4 M.J. 235 (C.M.A. 1978) (previous grant of issue relating to transfer of accused to USDB after trial vacated as improvident).

COMA, Cops and Subject Matter Jurisdiction: *Whatley* to *Saulter* to *Conn*

Major Norman G. Cooper, Senior Instructor, Criminal Law Division, TJAGSA

Having dramatically changed the rules of the game with respect to subject-matter jurisdiction,[1] the United States Court of Military Appeals in a trilogy of cases involving military policemen[2] has further blunted the service connection requirement for court-martial jurisdiction. What was once perceived as a flouting of military authority,[3] the criminal actions of a military policeman, enjoyed but a brief life as a basis for court-martial jurisdiction, and the United States Court of Military Appeals has cut off another arm of military authority over off-post crimes.[4] The short life of service connection predicated upon military police status is worth examining for its reflection of the Court's current position on subject-matter jurisdiction.

The beginning of any present inquiry into subject-matter jurisdiction is the locale of the offense.[5] Regardless of any on-post conspiracy to commit a crime, the ultimate commission of the crime off-post always raises an issue of service connection with respect to prosecution of the latter.[6] Once an issue of service connection arises, the United States Court of Military Appeals adopts an "analytical process of carefully balancing the *Relford* criteria to determine whether the military interest is distinct from and greater than that of the civilian jurisdiction. . . ."[7] In other words, the Court in each case examines the twelve factors[8] of the service connection equation enunciated by the Supreme Court in *Relford v. Commandant*.[9] In *United States v. Whatley*,[10] the majority of the United States Court of Military Appeals recognized that the commission of a crime by a military policeman, regardless of its locale, manifested a flouting of military authority, one of the key *Relford* factors.

In *United States v. Whatley*,[11] the accused, a military policeman, stole a tape player from a fellow serviceman's off-post trailer. The accused has learned that his victim would be going on-duty as he got off-duty, thereby enabling the accused to effect the larceny while the victim was occupied elsewhere. Judge Cook, writing the majority opinion, noted that the last circumstance made out a "direct relationship between the appellant's military duties and the crime. . . ."[12] Judge Cook also noted that the "appellant's status as a military policeman required that he perform as such off-base as well as on; consequently, acting as a criminal constituted a direct flouting of military authority, even though he was, at the particular time, away from the geographic limits of the base."[13] Thus was born the not irrational concept that a military policeman's delicts could have special significance to the military and therefore be proper subjects for court-martial. It would seem curious, indeed, if those charged specifically with enforcing military law could not be held accountable at courts-martial for flouting military authority. Nonetheless, after *Whatley* the United States Court of Military Appeals hastily retreated from this rationale.

Off-post drug transactions were the focus of the Court's attention in *United States v. Saulter*.[14] Therein the accused, a military policeman, sold illegal drugs off-duty to other military policemen. Chief Judge Fletcher, writing for the majority, finds it "unreasonable to suggest that every criminal offense committed

off base by a military policeman, even if in the company of other military policemen, is service connected simply due to the nature of their unrelated duties as military law enforcement officials."[15] Judge Cook dissents, finding that the stipulated facts indicate that the off-post transactions were related to on-post duties, namely, that in the course of their police duties purchasers of drugs learned that the accused was a seller. Judge Perry, who had concurred with Judge Cook in *Whatley*, opines that the stipulated facts are really ambiguous as to the relationship between military police duties and the ultimate drug transactions. Not one of the judges even mentions *Whatley* or its rationale! Was. *Whatley's* language concerning the flouting of military authority, put forth by Judge Cook and apparently concurred in by Judge Perry, written in invisible ink?

The answer to the latter is found in *United States v. Conn*,[16] wherein Chief Judge Fletcher at least acknowledges that *Whatley* is on the books insofar as his participation is concerned. The circumstances in *Conn* provided an excellent platform to present a flouting of military authority rationale for service connection. Therein, the accused was no less than a military police officer who used marijuana off-post in the presence of his military police subordinates. Chief Judge Fletcher, writing for the majority, finds that the accused's crime was not "a specific product of his military associations on-base or in the performance of his duties."[17] One's status as a military policeman is rejected as sufficient to establish service connection by Chief Judge Fletcher, who gives his opinion in *Whatley* a *"cf."*[18] in passing. He goes on in *Conn* to reject theories of military association[19] and jurisdictional merger[20] as sufficient to supply service connection. Judge Cook, in dissent, cites *Whatley* to conclude that "the military's interest was paramount to any interest of the civilian community."[21] Thus, the flame of service connection based upon a military policeman flouting military authority when he commits a crime is extinguished by Chief Judge Fletcher in *Saulter* and *Conn* while Judge Perry concurs without comment, leaving Judge Cook's proposition abandoned without a flicker of explanation. For the practitioner who saw meaning in Judge Perry's concurrence in *Whatley* as well as those who, as a matter of gastronomical jurisprudence,[22] felt that the military should have court-martial authority over those charged with enforcing the law who break it with impunity in off-post locales, *Conn* is a sharp setback. One wonders if in the eyes of Chief Judge Fletcher and Judge Perry service connection is a concept which only lives with respect to on-post crimes.

Footnotes

[1] *See, e.g.*, Squires, Jurisdiction Over Off-Post Offenses: An Update, THE ADVOCATE, May-June 1978, at 130, and Cooper, O'Callahan Revisited: Serving the Service Connection, 76 MIL. L. REV. 165 (1977).

[2] United States v. Conn, 6 M.J. 351 (C.M.A. 1979); United States v. Saulter, 5 M.J. 281 (C.M.A. 1978); and United States v. Whatley, 5 M.J. 39 (C.M.A. 1978).

[3] The (absence of) any flouting of military authority is one of the essential factors in determining service-connection for court-martial jurisdiction. Relford v. Commandant, 401 U.S. 355 (1971).

[4] The present United States Court of Military Appeals, for example, has negated per se court-martial jurisdiction over offenses involving drugs and service person victims, thereby serving automatic military disciplinary authority over members of the military who commit such offenses. See United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976) and United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976).

[5] In United States v. Klink, the on-post, off-post inquiry led to the peculiar result. Drug offenses occurring on an island surrounded by Fort Belvoir, Virginia, were deemed to have taken place "off-post" and hence not subject to court-martial jurisdiction absent other service connection indicia. Judge Cook, dissenting, notes "the possibility that the marihuana would enter the military community was a near certainty as its movement in any direction would place it on Fort Belvoir." Id. at 405.

[6] United States v. McCollum, 6 M.J. 224 (C.M.A. 1979). An on-post conspiracy charged as such may be tried by court-martial, but "the referred charges set the jurisdictional limits where plans to commit crimes off base are formulated on base." Id. at 225 n.2.

[7] United States v. Alef, 3 M.J. 414, 416 (C.M.A. 1977).

[8] There are twelve factors which must be weighed by determining whether an offense is properly triable by court-martial:

(1) The serviceman's proper absence from the base.

(2) The crime's commission away from the base.

(3) Its commission at a place not under military control.
(4) Its commission within our territorial limits and not in an occupied zone of a foreign country.
(5) Its commission in peace time and its being unrelated to authority stemming from the war power.
(6) The absence of any connection between the defendant's military duties and the crime.
(7) The victim's not being engaged in the performance of any duty relating to the military.
(8) The presence and availability of a civilian court in which the case can be prosecuted.
(9) The absence of any flouting of military authority.
(10) The absence of any threat to a military post.
(11) The absence of any violation of military property.
(12) The offense's being among those traditionally prosecuted in civilian courts.

[9] 401 U.S. 355 (1971).

[10] 5 M.J. 34 (C.M.A. 1978).

[11] Id.

[12] Id. at 40.

[13] Id. (Chief Judge Fletcher disassociated himself from this aspect of the opinion).

[14] 5 M.J. 281 (C.M.A. 1978).

[15] Id. at 284.

[16] 6 M.J. 351 (C.M.A. 1979).

[17] Id. at 353.

[18] "Cf." means "compare" where cited authority supports a different proposition but which is analogous.

[19] The accused's on-duty status created military associations with others which led to the commission of the offenses in their presence.

[20] Service connected offenses blend with others to form an overall pattern of criminal conduct.

[21] United States v. Conn., 6 M.J. 351, 355 (C.M.A. 1979).

[22] A matter of "gut reaction."

The U.S. Army Retraining Brigade: A New Look

Captain John L. Ross and Major Charles A. Zimmerman***

Changes in the operation of the U.S. Army Retraining Brigade (USARB) necessitated by recent decisions of the Court of Military Appeals,[1] combined with repeated inquiries to the Brigade SJA office from counsel in the field have convinced the authors of the need for an informative article on the operation of the USARB. Additionally, the delineation of post trial duties of defense counsel in *United States v. Palenius*,[2] suggests that defense counsel now must have at least a basic familiarity with the Army correctional system. Thus, the purposes of this article are to advise counsel of the recent changes in the Retraining Brigade's operation, to explain its current operation, and to suggest to defense counsel the effect that these recent changes might have on the advice they provide to their clients.

I. PRE-*ROBINSON* USARB

In order to appreciate the affect that *United States v. Robinson* and *Whitfield v. United States* have had on the USARB one must first understand how the Brigade functioned prior to *Robinson*. Prior to *Robinson*, all prisoners without punitive discharges or with suspended punitive discharges who had six months or less confinement time to be served upon arrival were sent to the USARB for correctional training.[3] The training facility, located at Ft. Riley, Kansas, was encircled by an eight foot fence topped with barb-wire and dotted with guard towers. Except for supervised training in other areas, prisoners/trainees spent a full nine weeks "behind the wire." Prisoner/trainees sentenced to less than nine weeks confinement nevertheless remained behind the wire and commingled with prisoner/trainees who were serving out their sentences to confinement. Thus, a person who received fifteen days confinement at a summary courtmartial, for example, was required to complete nine weeks of training commingled with sentenced prisoners and subject to essentially the same restrictions as were applied to sentenced pris-

oners. *United States v. Robinson*, for the first time questioned the legality of retention of an enlisted member within such a training program beyond the adjudged term of confinement.

Robinson, an enlisted member of the Air Force, had originally been convicted by court-martial and given a sentence which included confinement. Pursuant to Air Force regulations, Robinson was transferred to the 3320th Retraining Group at Lowry Air Force Base, Colorado, an organization similar to the USARB.[4] The Air Force program as it then existed included five graduated "Retrainee Privilege Levels" which specified the limitations placed on the freedom of a prisoner/trainee at a given point in the program. A prisoner/trainee began the program in Privilege Level I, the most restrictive category, and progressed to Level V, the least restrictive. While in Level III, Robinson was charged with and convicted of, among other things, failure to obey a lawful order by being off base, an area not authorized for Level III prisoner/trainees. The defense argued that since Robinson had completed his original sentence to confinement on 3 September 1974, as applied to him in January 1975, the restriction was unlawful.

By a two-to-one decision, the Court of Military Appeals agreed. Judges Cook and Perry noted that "retrainees" who had completed their sentences to confinement were commingled with prisoners still serving out their sentences. The "Retrainee Privilege Levels," applied without differentiation to both groups, constituted "an integral part of the penal institution's regimen."[5] However, rather than merely holding that the restriction was unlawful, since Robinson has not volunteered for the program, the judges concluded, "that retention of appellant within the 3320th Retraining Group beyond the adjudged term of his confinement was an unlawful extension of the sentence adjudged by his court-martial."[6] Chief Judge Fletcher dissented, concluding that the restrictive provisions of the regulation were a proper "exercise of a command function in the interest of training."[7]

II. POST-*ROBINSON* USARB

The implications of *Robinson* for the USARB were obvious. Initially, efforts were made through command channels to obtain release from the program of trainees who had reached their minimum release date (MRD). The Brigade responded by seeking to alter its appearance as a "penal institution." Most of the fence and the guard towers were torn down. Dual privilege levels were established with post MRD trainees entitled to somewhat less restriction on their movement than those trainees still serving out their sentences. Yet, the basic issue remained. Post-MRD trainees were still required to complete the nine week training program commingled with sentenced prisoners.

In *Huckey v. Trick*[8] the Court of Military Appeals indicated its willingness to consider the issue on a petition for extraordinary relief when it issued a show cause order in the case. Huckey had been sent to the USARB from Germany. He came to the Brigade armed with an Article 138 complaint prepared by his defense counsel for presentation to the Brigade Commander when Huckey reached his release date. The complaint asked for release from the program, citing *Robinson*. When the Article 138 complaint was denied, Huckey filed a petition for extraordinary relief with the Court. Because of the short duration of the USARB training program, however, Huckey successfully graduated from the USARB prior to final action by the Court, and the case was dismissed as moot.[9]

Then began a trilogy of similar petitions emanating from the Brigade, each seeking to raise the issue of the legality of continued retention in the USARB of soldiers who had completed their sentences to confinement. The primary arguments made by each petitioner were both that continued retention in the USARB program constituted an unlawful extension of their court-martial sentences under *Robinson*, and that involuntary commingling of petitioners with sentenced prisoners was an imposition of punishment without due process of law.[10] First, in *Romano v. Druit*[11] the Court flatly denied the petition. The Court seemed to

reverse itself, however, when Judges Cook and Perry concurred in issuing a show cause order when a nearly identical petition was filed in *Caffas v. Druit.*[12] As in *Huckey*, however, graduation prior to final Court action mooted the issue.[13] Finally, in *Jordan v. Druit*[14] the Court appeared to sanction the propriety of the USARB program by denying the petition after having issued a show cause order and having received briefs from both sides. Two of three formal petitions, with briefs, having been denied, the operation of the Brigade seemed to have been given a vote of confidence by the Court. That, however, was before Pvt. Dorian Whitfield arrived at the Brigade.

The circumstances of Pvt. Whitfield's assignment to the USARB were representative of many USARB trainees. Sentenced to 45 days confinement by a special court-martial, Whitfield had served 28 days of his confinement at the confinement facility at Mannheim before being transferred to the Brigade for the nine week program. His handwritten letter to the Court capsulized the feelings of many trainees.

> TO WHOM IT MAY CONCERN
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> 10, Dec 77
>
> I am interest (sic) in Knowing (sic) the Court of Military Appeals stand on due process of law and double jeapodry (sic). My Reason (sic) for asking is that I was sentenced to 45 days, and now am told that I must be confined in a sense for additional 9 wks at a retraining brigade. I want to Know (sic) how constitutional this is. Prompt response would be appreciated.
>
> /s/ Dorian Whitefield
>
> P.S. A record of this letter will be kept by me. Follow up letter will be written 10 working days after the above date.

The Court interpretted Whitefield's letter as a petition for extraordinary relief and issued a show cause order, requring briefs on the precise issue that had been raised in *Huckey, Romano, Caffas,* and *Jordan.*[15] Both sides filed essentially the same briefs as had been filed previously. This time, however, the Court heard oral argument before issuing the following order, Chief Judge Fletcher dissenting:

> Consideration of the pleadings and the arguments of counsel impels the conclusion that petitioner is being subjected to 'an unlawful extension of the sentence adjudged.'*United States v. Robinson. . .* It is, therefore, ordered that petitioner be forthwith released from all conditions of retraining and restraint incident to, or resulting from his retention in the United States Army Retraining Brigade. . . and that he be restored to such rights and privileges as he would have been entitled to on expiration of the term of confinement he was required to serve, under the court-martial sentence approved by the convening authority.[16]

III. POST-*WHITFIELD* USARB

The order in *Whitfield* caused officials at Department of the Army and the Retraining Brigade to reevaluate the status of prisoners undergoing the training program. In early March 1978, it was determined that all service members undergoing the rehabilitative training program at the Brigade would be in a non-prisoner status. There were three possible methods of accomplishing this. The first was to train prisoners in a confined unit until their minimum release date and then transfer them to an unconfined unit to complete training. The second was to allow prisoners to serve out their term of confinement prior to entering the training program. The third was to terminate prisoner status soon after arrival at the Brigade.

The first two methods were found to be least feasible and not conducive to effective rehabilitation. The first, where the prioner changes training unit upon release from confinement, would be disruptive to the team unity and esprit de corps, which are essential parts of the training program. Further, an important aspect of the rehabilitation effort is the strong bond that is created between the trainee and his primary NCO counselor. Transfer to a new unit during training would seriously impair the effectiveness of the counselors. Administratively, such a system would be difficult to man-

age as prisoners reach their minimum release date throughout the training cycle. The second method was rejected for two reasons. In recent years, the Army has stopped providing post-trial confinement service at installation confinement facilities.[17] They are no longer staffed with sufficient correctional personnel and professional service officers to carry out post-trial confinement. Also, long periods of incarceration, essentially without a rehabilitative effort, is detrimental to the prospects of effective rehabilitation. The longer a prisoner is away from a normal military environment, the less is his desire to return to honorable service.

The third method, termination of prisoner status soon after arrival, was found to the most feasible way to comply with the Court's directive. All service members arriving at the United States Army Retraining Brigade are prisoners. The criteria for shipping prisoners to the Brigade have not changed. All prisoners without punitive discharges or with suspended punitive discharges who have six months or less confinement to serve upon arrival will be sent to the USARB.[18] This includes female as well as male prisoners. Upon arrival all prisoners are confined either in the Fort Riley Confinement Facility or at the Brigade in a confined area. Initial inprocessing, to include extensive social work interviews, is accomplished and prisoners are prepared to enter the rehabilitative program. A very few are identified as nonrestorable, transferred to the Ft. Riley Confinement Facility and eventually administratively discharged from the service. Those selected for training have their prisoner status terminated in three different ways. Obviously those with little time remaining to be served upon arrival will reach their minimum release date and enter training having served their entire sentence to confinement. Sentenced prisoners have the unexecuted portion of the sentence to confinement suspended by the appropriate commander at the Brigade and enter training as duty soldiers in a suspended status. The action to suspend is based on the promulgation order received from the initial convening authority or an electronic message indicating the action taken.[19] The confinement is suspended to one of two dates. For those prisoners with suspended punitive discharges, the confinement is suspended until the date the initial convening authority suspended the discharge. For those without punitive discharges, the confinement is suspended until their projected graudation date plus 70 days. The additional 70 days is provided to allow the gaining unit commander sufficient time to evaluate the graduate while he is in a probationary status. For adjudged prisoners, that is, those serving confinement which has not been approved and ordered executed by the convening authority, the deferral powers of the Retraining Brigade Commander are utilized to terminate confinement.[20] Deferral of confinement is, of course, voluntary on the part of the prisoner. Each adjudged prisoner selected for training is explained the meaning of deferment, the plenary power of the commander to rescind deferral, and the fact that upon action by the initial convening authority the approved confinement will be suspended. Upon the adjudged prisoner's written request, the unexecuted confinement is then deferred. When notice is received of action by the convening authority, unexecuted confinement is then suspended, effective on the date of action or entry into training, whichever is later.

In these three ways all trainees actively engaged in the rehabilitative program are in a non-prisoner status. They enjoy the rights, privileges and responsibilities of any duty soldier undergoing a rigorous and demanding training program. Their pass privileges are those of any soldier and are curtailed only by the demands of training.

Obviously, not all of those who enter training graduate. Presently approximately 29% of those entering training are identified for elimination prior to graduation.[21] Separation from the service is accomplished either through the administrative discharge procedures or by execution of an approved punitive discharge. In order to carry out the intent of the trial court and the convening authority in approving the sentence, those soldiers with confinement time remaining to be served are normally reconfined

following an appropriate procedure.

Some soldiers are still in a deferred status well into the training program because initial action has not been taken by the convening authority. such soldiers identified for administrative elimination have their deferment rescinded for cause.[22] For soldiers in a suspended status, a due process hearing is held to determine whether there is evidence of sufficient violation of parole to justify reincarceration.[23] When a suspended punitive discharge or confinement adjusged by general courts-martial are involve, a full Article 72 proceeding is held.[24] At the same time proceedings are being held to reconfine the soldier, an administrative discharge packet is prepared and proceedings under AR 635-200 are held. If discharge is recommended by the board of officers, or if a board is waived, and the Brigade Commander approves the discharge, it is made effective on the prisoner's minimum release date.

IV. IMPACT ON THE DEFENSE

The present operation of the Retraining Brigade offers two main advantages for an accused who desires to complete his enlistment honorably. First, successful completion of the program is a necessary and beneficial first step towards honorable completion of the enlistment obligation. Second, the present practice of suspending or deferring the confinement of trainees has the effect of substantially reducing the impact of the court-martial sentence for those who complete the program.

The first advantage of the program can best be measured by the number of soldiers successfully returned to honorable duty. Since its inception in 1968, over 30,000 soldiers—the equivalent of two divisions—have successfully completed the Retraining Brigade program. Additionally, the latest statistics available, from FY 76, indicate that of those trainees returned to duty who have subsequently been discharged, only 18.5% have received less than honorable discharges, and the statistics also indicate a progressive yearly decline in that percentage.[25]

The more immediately beneficial aspect from a defense viewpoint of the Retraining Brigade's current operation, however, is the mitigating impact it has on a prisoner's sentence. The core of the training program begins after the trainee has spent approximately two weeks in an initial processing unit. Those first two weeks are considered confinement. The suspension or deferral of confinement is accomplished when the trainee is transfered to a training unit. Since the time spent in training is not considered confinement, it is not "bad time" and does not extend the trainees' expiration of term of service. The practical effect of this procedure is that a soldier sentenced to six months' confinement, for example, will normally only serve two weeks of confinement in processing unit in addition to that served in an area confinement facility prior to transfer to the USARB. Therefore, from a defense viewpoint, the quicker an accused can be transferred to the USARB following conviction the less total confinement he will serve and the less bad time that will be added onto his ETS. It must be borne in mind, however, that if a trainee does not successfully complete the program and is administratively discharged, an appropriate vacation proceeding or revocation of deferral may take place and the trainee may be required to complete his sentence to confinement.[26]

CONCLUSION

Clearly, significant changes have taken place within the past 18 months in the operation of one of the Army's two main correctional institutions.[27] A separate chapter of the new AR 190-47 is devoted soley to the Retraining Brigade.[28] Whether these changes solve the problems seen by the Court of Military Appeals remains to be seen. The only case presented to the Court since *Whitfield* was dismissed as moot.[29] Hopefully, however, this article fills whatever void of information exists regarding the Retraining Brigade and will be of assistance to defense counsel in fulfilling the post trial duties placed upon them by *Palenius* and in adequately advising their clients.[30] A full and favorable advice on the USARB given to an accused by his defense counsel can go a long way towards creating a positive attitude in the

accused that will greatly assist him in completing the program and his military obligation honorably.

APPENDIX OF TRAINING PROGRAM[31]

Through a variety of classes, counseling, and learn-by-doing techniques the USARB seeks to fulfill its mission and effect behavioral and attitudinal changes in the trainee. Defense counsel should provide their clients with an idea of what they can expect while at the USARB. The four main training disciplines and examples of related subjects are listed below.

Military and Social Adjustment: individual and small group counseling, military justice, benefits of an honorable discharge, money management, daily inspections, seven steps, family problems and solutions, new unit adjustment, deception in advertising.

Individual Growth: how to get along, success, GED classes, Abilene (Eisenhower Center) tour, communication techniciques, decision making.

Physicial Training: daily PT, drownproofing, PT tests, inter-unit athletics, bowling.

Field and Related Training: drill and ceremonies, map reading, recondo, land navigation, survival, escape and evasion, self-defense, patrolling, mountaineering, confidence course, obstacle course, orienteering, leadership reaction course.

FOOTNOTES

*Captain Ross received his B.S. cum laude from Central Michigan University in 1973 and his J.D. from the University of Toledo in 1976. After serving for twenty-one months, primarily as a defense counsel, at the Retraining Brigade he is currently a defense counsel with the 1st Infantry Division at Ft. Riley.

**Major Zimmerman graduated from Bucknell University in 1964 with a B.A. degree, and he received his J.D. from Rutgers University in 1967. He is formerly the Staff Judge Advocate of the Retraining Brigade, and is currently the Deputy Staff Judge Advocate of the 2d Infantry Division in Korea.

[1] *United States v. Robinson*, 3 M.J. 65 (C.M.A. 1977); *Whitefield v. United States*, 4 M.J. 289 (C.M.A. 1978).

[2] 2 M.J. 86 (C.M.A. 1977).

[3] C 1, AR 190-47 (3 March 1976), para. 4-2b.

[4] Compare the respective mission statements, AFM 125-2 (8 November 1971), para. 8-1 and C 1. AR 190-47 (3 March 1976), para. 1-3b. See also AR 190-47 (1 October 1978) para. 13-2.

[5] *Robinson*, supra at 67.

[6] *Id.*

[7] *Id*,

[8] 3 M.J. 261 (C.M.A. 1977).

[9] 3 M.J. 388 (C.M.A. 1977)

[10] See e.g., Article 13 UCMJ (10 U.S.C. §813); *United States v. Bayhand*, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956); *United States v. Nelson*, 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969).

[11] 3 M.J. 425 (C.M.A. 1977).

[12] 4 M.J. 14 (C.M.A. 1977).

[13] 4 M.J. 139 (C.M.A. 1977)

[14] 4 M.J. 116 (show cause order), pet. denied 4 M.J. 158 (C.M.A. 1977).

[15] 4 M.J. 221 (C.M.A. 1978).

[16] 4 M.J. 289 (C.M.A. 1978).

[17] Modification Plan for Army Confinement, 1 March 1977.

[18] Compare AR 190-47 (1 October 1978), para. 4-2b with C 1, AR 190-47 (3 March 1976), para. 4-2b.

[19] See M.C.M. 1969 (Revised), para. 97a.

[20] *Id.*, para. 88f.

[21] Statistics supplied by Research and Evaluation section, USARB, current as of FY 78. This figure does not include 11% who ETS'd or were DFR in FY 78.

[22] See MCM 1969 (Revised), para. 88g.

[23] Article 72(c) UCMJ (10 USC §872(c)).

[24] See *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977); *United States v. Rozycki*, 3 M.J. 127 (C.M.A. 1977).

[25] Statistics supplied by Research and Evaluation section, USARB.

[26] Defense counsel might also note, should they find themself representing a USARB graduate at a rare second court-martial, that upon graduation a USARB trainee is issued a graduation certificate. Query the admissibility of the prior conviction for impeachment in light of Federal Rule of Evidence 609(c)? See *United States v. Weaver*, 1 M.J. 111 (C.M.A. 1975).

[27] Indicative of the rapidity with which changes occur in the operation of the USARB is the USARB Commander's recent decision not to continue the practice of sus-

pending remaining forfeitures upon successful graduation. This decision, to be effective on or about 1 May 1979, retreats from the theory that USARB graduates should arrive at their new unit with a "clean slate." Previously, the policy of suspended forfeitures upon graduation combined with Article 57(c) of the UCMJ to substantially mitigate its effect on a sentence to forfeitures,"

[28] AR 190-47 (1 October 1978), Chapter 13.

[29] *Gwynn, et al. v. Sallee,* 5 M.J. 16 (show cause order), dismissed 5 M.J. 133 (C.M.A. 1978).

[30] The one term of misinformation that trainees most frequently indicate that they have received from their defense counsel is that a trainee will automatically be discharged if he indicates that he wants out of the Army. A discharge is *not* automatic at the USARB, even if the trainee indicates a desire for discharge. Discharge is within the discretion of the Brigade Commander. If a discharge is approved, it will be effective only after completion of confinement.

[31] USARB, "Program of Instruction," Operations and Training section.

Supervisory Reviews Under Article 65(c), UCMJ

In US v. Hill, SPCM 13707 (ACMR 30 Mar 79), ACMR reassessed the sentence where at appellant's trial a previous conviction was erroneously admitted into evidence during the presentencing portion of the proceedings. the supervisory review of the previous conviction required by Article 65(c), UCMJ, and paragraph 94*a* (2) *MCM, 1969 (Rev.),* was made by the judge advocate who had been the trial counsel in that case. Citing US v. Engle, 1MJ 387 (CMA 1976), the court found that because the trial counsel was incompetent to conduct the supervisory review, the prior conviction was not final and it could not be properly admitted into evidence. There was no objection to the admission of the prior conviction by defense counsel either at trial or in his rebuttal to the staff judge advocate's review. Under the doctrine of US v. Helflin, 1 MJ 131 (CMA 1975), the court declined to invoke waiver by the trial defense counsel. In its opinion the court said, "We strongly urge all jursidctions to review the procedure used to conduct the supervisory reviews of regular special and summary courts-martial. Judge advocates who have taken part in cases in some manner or who will be called upon in any way to review their own work product should not conduct the supervisory review."

Inadequate review by jduge advocates of inferrior courts-martial, pursuant to Article 65 (c), UCMJ, continues to be a matter of concern. The frequency at which uncorrected errors are observed leads to the conclusion that the importance of the Article 65(c) review is not properly appreciated by some judge advocates. For all practical purposes, the Article 65(c) review is the final review for records of trial by summary court-martial, and by special court-martial which did not result in an approved bad conduct discharge. Paragraph 94*a* (2), *MCM, 1969 (Rev.),* states that the finding of legal sufficiency by the supervisory authority renders the proceedings final, within the meaning of Article 76. Except for a case brought to the attention of The Judge Advocate General under Article 69, there is no further review of records of trial by inferior courts-martial.

In order to protect fully the interests of both the accused and the Government, the judge advocate performing the supervisory review must assure that the proceedings, findings, and sentence as approved by the convening authority are correct in law and fact before the record is declared to be legally sufficient. When reviewing records of trial by special court-martial, the DD Form 494 checklist serves as a convenient guide. However, filling in the checklist without carefully examining the record of trial is merely cosmetic, and falls short of the review required under Article 65(c). Unless the reviewing judge advocate carefully examines each record of trial, and insures that the proceedings, findings, and sentence as approved by the convening authority are correct in law and fact, there can be no true determination of legal sufficiency.

Standard Army Automated Support Systems/Judge Advocate General's Corps

By Major F. John Wagner, Combat Developments Officer, TJAGSA

In the December 1978 issue of The Army Lawyer, there appeared a brief article on word processing equipment. Standard Army Automated Support systems/Judge Advocate General's Corps (SAASS/JAGC) was introduced to the Corps by that article. Considerable progress has taken place in SAASS/JAGC since that article was written.

SAASS/JAGC was developed by The Judge Advocate General's School in conjunction with the Adjutant General's Center. It is a portion of the overall Standard Army Automated Support Systems being developed by the Adjutant General's Center. The purpose of SAASS is to identify, develop, design and establish Standard Army Automated Support Systems for various TDA activities which perform essentially the same type of functions or exhibit a high degree of uniformity as far as work load, organization, and mission requirements are concerned. The typical SJA office, which performs one or more of the standard JAG Missions (legal assistance, criminal law, administrative law, contract law, claims, international law, and law office administration), fits squarely into the concept of SAASS.

The objective of SAASS/JAGC was to reduce workload requirements imposed on Staff Judge Advocates and their administrators by AR 340-8, Word Processing Program, in the justification and acquisition of automatic word processing (WP) equipment and other related systems.

The School has developed SAASS/JAGC and it consists of two parts. The first and major work product of SAASS/JAGC is a package of worksheets. This package is designed to allow a legal office administrator to complete and forward to TAGCEN as a complete justification for WP equipment, in lieu of the lengthy and usually unfamiliar system required by AR 340-8. The completion of this package by the user takes hours rather than days. Its use will completely negate the necessity for the two-week survey required by the regulation.

The second work product is a set of specifications for WP equipment to be acquired by JAGC offices. By using these specification, TAGCEN, and the requesting SJA will be able to identify vendors who can provide and service the kinds of WP equipment required in SJA offices. Practically, this means the requesting Staff Judge Advocate will only have to consider those vendors whose equipment has been predetermined to be able to meet the needs of that particular office. Once the user completes the package and forwards it to TAGCEN, personnel in the Equipment and Technology Branch, AMD, will determine if that office has a workload which requires WP equipment, and if so, how many and what types of hardware are needed.

TAGCEN will then be able to send the user a list of local vendors to the requesting SJA and who can supply that SJA with the needed equipment, along with an approval of purchase.

SAASS/JAGC has been approved by The Judge Advocate General for use on a test basis at installations within the United States Army Training and Doctrine Command. The test is to be conducted in a manner that will permit a complete evaluation of the acquisition system and the acquired equipment. The test period will last for one year. At the end of that year, a completed evaluation will be submitted to the Office of the Judge Advocate General.

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Judiciary Notes

From: U.S. Army Judiciary

Recurring Errors and Irregularities:

1. The following errors in the initial promulgating orders were corrected by the Army Court of Military Review for the month of April 1979:

a. Failure to properly set forth the specification of a Charge-5 cases.

b. Failure to properly set forth the pleas of the accused-2 cases.

2. The name paragraph of the initial promulgating order should include the following information in the following order: rank, name, social security number, U.S. Army, and full unit and organization to which assigned. Several orders have failed to include the words "U.S. Army".

DIGEST-ARTICLE 69, UCMJ, APPLICATIONS

The *Elwell* case, SPCM 1979/4349, involved the admissibility of two DA Forms 4187. The applicant contended that they were completed contrary to regulation and thus not within the official records exception to the hearsay rule.

According to the exhibits in question the accused was dropped from the rolls of the 76th Engineer Battalion at Fort Meade, on 24 July 1978. He returned to military control at the 526th Military Police Company, also at Fort Meade, and was turned over to the 76th Engineer Battalion. A representative of the 76th Engineer Battalion entered the duty status of "Dropped from rolls to Attached effective 1115 hours, 31 July 1978". The applicant contended that under the provisions of Note 4 to paragraph 5-9*c*, AR 680-1, a duty change in Section II of DA Form 4187 of "Dropped from rolls to Attached" can be used only where the service member returns to military control at the unit from which he was dropped from the roles. It was concluded that the regulatory provision in question did not preclude the accused's former unit from reporting his status even though he came under control initially at another unit. Inasmuch as the accused was no longer assigned to a unit of the 76th Engineer Battalion, that organization was required to show him as attached. The purpose of that duty status change was to obtain and reinstate the service member's records and to obtain accession orders.

However, other errors, to which objections were made at trial, made the aforementioned prosecution exhibits inadmissible under the official records exception to the hearsay rule. Each of those documents was verified and signed in Section V of the form (entitled "Certification/Approval/Disapproval") by "———SSG PAC SUP". Among the defense objections to these exhibits was the contention that under AR 680-1 an E-6 is not authorized to verify a DA Form 4187. The Judge Advocate General concluded that this contention had merit and granted partial relief. Under common rules of construction the words "senior enlisted members (E7, E8, E9)", set forth in paragraph 5-9, AR 680-1, as changed, must be read to exclude an E-6. The finding of guilty as to Specification 1 of the Additional Charge was set aside.

DIGEST-ARTICLE 69, UCMJ, APPLICATIONS

In Fletcher, SPCM 1979/4354), The Judge Advocate General considered an issue of collateral estoppel: was the government barred from litigating at trial the question of whether the accused had the authority to wear the Combat Infantry Badge, the Ranger Tab, and the Parachutist Badge.

The applicant was convicted of wearing, wrongfully and without authority, upon his uniform the ribbons representing the Purple Heart, the Combat Infantry Badge, the Ranger Tab, and the Parachutist Badge, between 1 July 1977 and 5 January 1978. He had been

previously tried by a special courtmartial for the offense of wearing, wrongfully and without authority, upon his uniform the Combat Infantry Badge, the Ranger Tab, and the Parachutist Badge, on 16 April 1974. At the first trial, a motion for a finding of not guilty was granted on the grounds that "although the government had brought forth some evidence as to the accused's authorization to wear the decorations, the evidence was insufficient." At the second trial, the defense made a motion to dismiss the charge and specification on the grounds of former jeopardy. The military judge denied the motion on the ground that the offenses were separate.

Res judicata operates to prevent relitigation of a cause of action which has already been litigated between the parties, or between those in privity with them. The pendant doctrine of collateral estoppel operates to prevent relitigation between the same parties, or between those in privity with them, in a prior controversy based upon a different cause of action. The doctrine of *res judicata* and the rule of collateral estoppel are generally subsumed in double jeopardy issues whenever they arise. They, however, have independent life in criminal cases and are applicable under military law. *See* O'Donnell, Public Policy and Private Peace—the Finality of a Judicial Determination, 22 Military Law Review 57 (October 1963); paragraph 15-10, Military Justice Trial Procedure, DA Pam 27-173 (April 1978).

The Judge Advocate General concluded that the issue of the accused's authorization to wear the awards in question was not finally determined by the 1974 special court-martial. The finding of not guilty at that trial, albeit based on insufficiency of evidence, was not a final determination that the accused was authorized to wear the Combat Infantry Badge, the Ranger Tab, and the Parachutist Badge. The second court-martial involved an offense that was committed during a different period of time; it was a different offense than that in the 1974 court-martial. Therefore, the military judge's decision to deny the accused's motion to dismiss was correct. Relief was denied.

A MATTER OF RECORD

Notes from Government Appellate Division, USALSA, to Improve Court-Martial Prosecutions

1. Arraignment:

Trial counsel should not update his "flyer" or "arraignment sheet" before giving it to the court members after the military judge dismissed several charges or amended specifications.

2. Citation of Authority:

When citing cases to the military judge, use the full citation. References to the "decision in the Smith case" or "Jones, cited in 2 M.J." are not helpful to appellate counsel and judges trying to determine the authority counsel rely upon to support their positions at trial.

3. Drugs:

In drug cases qualify the CID/MPI agents or the informant as an expert at recognizing the drug so that there is independent evidence to cover an attack on the lab report. Additionally, where a field test is conducted, elicit as many details as possible about the agents' knowledge and experience with the test, as well as the result.

4. Illegible Exhibits:

These often necessitate requests for enlargements to go to the field for legible copies, causing unnecessary delays.

5. Immunity:

After a Government witness, who had been tried by general court-martial for his part in the same offense, refused to answer questions put to him by the trial counsel, trial counsel told the military judge:

> [The witness' defense counsel] and I and [witness] have discussed the case and I have assured [the witness] that no action will be taken against him, other than the action that was taken at the general

court-martial.

This comment appears to reflect testimonial immunity, yet the record is silent with respect to any grant of immunity; this witness had a pretrial agreement which had no provision for his subsequent testimony; the staff judge advocate does not address the subject; there are no instructions on the matter by the military judge; and nothing in the allied papers shows any agreement. The error raised here is that the staff judge advocate and convening authority are disqualified from reviewing the case. Trial counsel should avoid such statements, especially since he does not have authority to grant immunity.

6. Insufficient Evidence:

Appellant was charged with, *inter alia*, larceny of a shotgun. A couple of days before trial, the trial counsel discovered that the shotgun had never been stolen; yet, he did nothing and the charge went to the court members. At the close of the prosecution's case, trial counsel tried to explain his inaction by stating that he knew that the accused would move for a finding of not guilty and that he had planned not to oppose it. *See* paragraph 44*f*(5), MCM, and DR 7-103.

7. Presentence Proceedings:

a. At a side bar conference during the presentencing phase of the trial, the military judge advised accused of his rights to allocution; however, the judge failed to mention that the accused had the right to remain silent. Despite his presence at the conference, the trial counsel did not note this omission. When the trial counsel secures a conviction, he does not become a spectator.

b. In an apparent effort to comply with *United States v. Booker*, 5 M.J. 238 (CMA 1977) the following language was placed upon an Article 15 form which was introduced in evidence:

> Being informed of and understanding my right to see an attorney to aid me in deciding whether to accept this Article 15 and preparing my defense, I (have seen an attorney) (waive my right to see an attorney). Further being informed of and understanding my right to demand disposition of the offense in a criminal proceeding with all rights and benefits conferred by law, I (do) (do not) demand a criminal proceeding.

Because someone had crossed out all words in the first two sets of parentheses, it was not possible to ascertain whether appellant saw an attorney or waived his right to see one. Additionally, the aforementioned statement contained no signature. Trial counsel would be well advised to bring such matters to the attention of the military judge so the latter can take the actions outlined in *United States v. Mathews*, 6 M.J. 357 (CMA 1979).

DIGEST-ARTICLE 69, UCMJ, APPLICATIONS

In *Frontado-Ponce*, SPCM 1979/4361, The Judge Advocate General denied relief from a finding of guilty as to a violation of Article 93, U.C.M.J., by maltreating Private F, a person subject to the orders of the accused, a staff sergeant. The applicant contended that the evidence was insufficient to support the findings that he maltreated Private F.

The evidence of record showed that the accused called Private F out of the company formation and told him to stand on a trash can in front of the formation and say "that he [Private F] was a bitch because he was fat and f——— up." The defense evidence did not contradict this evidence, although it was asserted that the incident occurred because Private F had first called another trainee "a fat little f——— pig."

To be punishable under Article 93, U.C.M.J., maltreatment must be real, although not necessarily physical. Paragraph 172, M.C.M. 1969 (Rev.). There is no rigid rule as to what constitutes maltreatment. Ordinarily, it is a question of fact to be determined by the trial forum. United States v. Finch, 22 C.M.R. 698 (N.B.R. 1956). Subjecting Private F to the humiliating

and degrading exercise in question, regardless of whether Private F had previously behaved improperly, could consititute maltreatment with the meaning of Article 93. Whether it did was, under the circumstances, a question of fact for the trial court.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Military Installation, Solicitation Privileges) Staff Judge Advocates Should Review Reports Of Investigation Carefully When Used For Suspension Of Solicitation Privileges. DAJA-AL 1978/3794, 15 November 1978. A military installation sent The Adjutant General a report of investigation pertaining to the solicitation activities of a company and its agents and a request to suspend their solicitation privileges Army-wide for a period of five years. In reviewing the report of investigation for The Adjutant Geeneral, The Judge Advocate General found several administrative errors. The solicitor, two agents of a corporation, and the corporation, were given notice to show cause why their solicitation privileges should not be suspended, but the letters of notification did not address certain misconduct which was used by the installation to suspend the solicitation privilege temporarily. Additionally the letter of notification cited incorrect paragraphs in AR 210-7 for certain misbehavior. It is important that letters of notification be correct and properly advise the addressee of all conduct alleged to be in violation of the regulation. The Judge Advocate General advised that without written notice identifying the alleged misconduct, such conduct should not be considered in revoking the solicitation privilege.

The Judge Advocate General noted that the letter of notification indicated that the agents were excluded from the installation, rather than solicitation privileges suspended. While barring an agent from an installation may be appropriate, care should be given to insure that the suspension letter indicates suspension.

Because the corporation involved in this case was substantially the same as a previously banned corporation, it would have been appropriate to consider this evidence in suspending the corporation's solicitation privilege; however, the notification letter did not indicate that the relationship between the two corporations would be a factor in the determination to suspend the corporation's solicitation privilege and thus, evidence should not be considered.

(Separation From The Service—Discharge) A Discharge Effected In Violation Of Procedural Rights Accorded By Army Regulation 635-200 Was Void And The Doctrine Of Constructive Discharge Was Inapplicable In This Case. DAJA-AL 1978/4008 18 Dec. 1978. A Sergeant First Class was discharged under Chapter 16 (now Chapter 9), AR 635-200 for alcohol abuse. He petitioned the Army Board for Correction of Military Records in an effort to be returned to active duty. The Judge Advocate General, reviewing the record of the Board, found that the elimination proceedings were legally insufficient due to irregularities which violated the soldier's procedural due process rights.

Following the above determination, the Board returned the file to ODCSPER for corrective action. In response to an inquiry from ODCSPER, The Judge Advocate General determined that the original discharge was void and that the Army could properly order the individual back to active duty, administratively withdraw his DD Form 214 (Report of Separation from Active Duty) and annotate his records that the discharge was void. If his new command then decided to initiate an elimination action for alcohol abuse, a new enrollment in the Alcohol and Drug Abuse Preventive Con-

trol program and a new determination of rehabilitative failure would be necessary.

The Judge Advocate General also considered whether the doctrine of constructive discharge could be applied to this case because the individual waited eleven months to initiate his action before the AGCMR. However, to utilize the doctrine, there must be clear evidence that the individual, either by an affirmative act or inactivity for a substantial period of time, and the Army, acquiesce in the discharge. In this case, the soldier's petition to the ABCMR showed that he did not acquiesce in the discharge and his eleven month delay in initiating the petition was not long enough to cause prejudice to the Government. Therefore, no constructive discharge was found.

Administration—Preventive Law. *Conservation Students To Get Vocational School Refunds.*

Some former students of North American Correspondence School's School of Conservation can now get refunds of up to $200 per course, the FTC announced. The student refunds are required under the terms of an FTC order issued for public comment last October before its final approval.

The FTC order requires that the firm send a questionnaire, through an independent contractor, to former students to determine their eligibility for refunds. Students will be considered eligible if:

. . . their enrollment applications were accepted between March 26, 1973 and March 25, 1976;

. . . they paid full tuition by June 30, 1977;

. . . they enrolled in the course to get a job in conservation or ecology;

. . . they failed to get a job in conservation or ecology within two years of terminating the course or when they receive the questionnaire, whichever is earlier;

. . . they respond to the questionnaire before the deadline indicated.

Individuals who think they might be eligible for refunds should contact Ann Guler, Los Angeles Regional Office (213) 823-7575, for further information.

The order requires North American within one year to make refunds of $200 to eligible students who completed all course work and to make refunds of $100 to eligible students whose enrollment was cancelled or terminated. Students who were reimbursed by any agency or private organization will receive refunds for the amount of tuition not reimbursed.

The FTC settlement with North American also requires that it disclose to prospective students information about the employment of its graduates and provide a cancellation notice and cooling-off period.

The order also prohibits North American from making misrepresentations and requires that it have a reasonable basis for making any advertising claim. [Ref: Ch. 2, DA Pam 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Truth in Lending. *Surcharges Prohibited.*

The Board of Governors of the Federal Reserve System has adopted an amendment to its Regulation Z, "Truth in Lending," to reflect the extension of the prohibition against surcharges to February 27, 1981, as required by Section 1501 of the Financial Institutions Regulatory and Interest Rate Control Act. [Ref: Ch. 10, DA Pam 27-12.]

Commercial Affairs—Commercial Practice and Controls—Federal Statutory and Regulatory Consumer Protections—Truth-In-Lending Act. *Truth in Lending Act prohibits reaffirmation of a debt discharged in bankruptcy without disclosure as a finance charge.*

When Household Finance Corporation was approached for new loans by those who had prior debts owed to it discharged in bankruptcy, and where the discharged debtor was otherwise eligible for a new loan, Household Finance Corporation would grant such a loan provided the discharged debtor would sign a contract which reaffirmed all or part of the dis-

charged debt and obligated the borrower to repay to Household Finance the amount of that debt plus the amount of the new loan advanced. The amount of the reaffirmed debt previously discharged in bankruptcy was disclosed to the borrower as an "amount financed" rather than as a "finance charge." The complainant alleged that the amount of the reaffirmed debt represents a charge which is payable directly or indirectly by the borrower as an incident to or condition of the extension of credit and, therefore, constitutes a cost of credit and is a finance charge as "finance charge" is defined in Regulation Z. The complainant further alleged that Household Finance, in connection with such loans, by including the amount of the reaffirmed debt in the disclosure of the "amount financed" rather than in the disclosure of the "finance charge" failed to accurately compute and disclose the finance charge, the annual percentate rate to the nearest quarter of one percent, and the amount financed, as required by various sections of Regulation Z. An administrative law judge concluded that by including the amount of the reaffirmed debt previously discharged in bankruptcy under the amount financed" rather than under the "finance charge," in cases in which discharged debtors apply for and are granted new loans by a respondent provided that they reaffirm their discharge debts in whole or in part, Household Finance has failed to disclose accurately the "finance charge" and has thereby violated the Truth in Lending Act and Regulation Z. The court further concluded that where the foregoing violation has occurred, that such violation also resulted in other violations of the Truth in Lending Act and Regulation Z which were alleged by the complainant. The court ordered Household Finance Corporation to cease and desist from failing to include and treat as part of the finance charge, as "finance charge" as defined in regulation Z, the amount of any indebtedness by the borrower to respondent, previously discharged in bankruptcy, which was reaffirmed as an incident to or condition of the extention of credit. The administrative law judge further stated that "in connection with this order, a reaffirmation is not an incident to or a condition of the extention of credit *only* if: (a) the reaffirmation is not required by respondent and is not a factor in or connected with the respondent's approval of the extention of credit or its terms or the amount of credit extended; and (b) any borrower who consumates a consumer credit transaction with respondent, and who reaffirms a discharged debt to respondent, in whole or in part, executes a separately signed and dated written statement of the agreement to reaffirm after first receiving from respondent a clear and conspicuous written disclosure of (1) the amount of the reaffirmation, and (2) that such reaffirmation is not required by respondent and is not a factor in or connected with respondent's approval for extension of credit or its terms or the amount of credit extended."

In the Matter of Household Finance Corpation, Federal Trade Commission Administrative Law Judge's Initial Decision and Order, Docket Number 9111, March 16, 1979 [Ref: Ch. 10, DA Pam 27-12.]

Labor Law Item

Labor and Civilian Personnel Law Office, OTJAG

The Federal Labor Relations Authority (FLRA) has changed the procedure for filing unfair labor practice charges (ULP) set forth in Part 203 of Title 5, Code of Federal Regulations. No longer will a charging party file charges directly with the party against whom the charges are directed. Rather, all charges, regardless of the date of occurrence, will be filed with FLRA. The FLRA's Notice is dated March 7, 1979, and copies may be obtained from the FLRA, 1900 E Street, N.W., Washington, D.C. 20424.

The Merit Systems Protection Board has published interim operating procedures in the Federal Register of Friday, March 23, 1979, Part XI, F.R. Vol. 44, No. 58. Part 1201, which implements the Board's original and appellate jurisdiction under the civil Service Reform Act of 1978, is of particular interest to Labor Counselors.

In response to a question as to whether a supervisor could lawfully be given an order to prepare and sign a Career Appraisal rating on DD Form 1559 that did not reflect the rater's honest opinion and best judgment, The Judge Advocate General concluded that the employee evaluation on the Career Appraisal, DD Form 1559, is a discretionary determination requiring the exercise of judgment by the rating official. Where a superior orders a subordinate to perform a discretionary act in a specified manner the act becomes that of the ordering official and it would be improper for the rater to represent it as his own independent act. Accordingly, an order that requires an individual to prepare and sign a discretionary rating that does not reflect his honest opinion and best judgment is improper.

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Protection—Fair Debt Collection Act. *The Federal Commission submits first annual report to the Congress on the Fair Debt Collection Practices Act.*

On March 20, 1979, pursuant to section 815(a) of the fair deal Collection Practices Act 15 U.S.C. §1692, the Federal Trade Commission, in its annual report to the Congress concerning the administration and enforcement of the Act, reported recommendations the Commission deems necessary, a statement of the level of compliance with the Act, and a summary of enforcement actions taken during the year. In the report, the Commission made three legislative recommendations. First, because it found little difference between the practice employed by certain creditors and those employed by debt collection firms, evidence existed that the collection practices of creditors may be more egregious than those practices engaged in by debt collectors, and the evidence of reported abusive debt collection practices by creditors has increased since the passage of the act, the Commission recommended that the Congress reconsider its decision to exempt creditors from the provisions of the Act. According to the commission, the statue should apply to all firms which engage in practices which the Congress has determined to be unlawful without regard to the nature of the firm involved.

Secondly, the Commission noted that the existing notice requirements under §809 of the Act, which require debt collectors to inform consumers of the procedure for contesting the validity of the debt being collected, be amended to include notice of: (1) the consumers right to stop collection activity, (2) the fact that the Fair Debt Collection Practices Act protects the consumer from unfair and deceptive practices, and (3) the fact that the Federal Trade Commission is the agency charged with administering the act.

Lastly, the commission recommended that §809 (a) (4) be modified to leave no doubt that it does not require or authorize reference to a judgment where no such judgment exists. Presently, § 809 (a) (4) requires that the debt collector send the consumer a written notice containing, *inter alia,* a statement that if the consumer notifies the collector that the consumer contests the debt, the debt collector will obtain "verification of the debt or a copy of judgment against the consumer and a copy of *such verification or judgment* will be mailed to the consumer. . . " (emphasis added).

In proporting to comply with the Act, many debt collectors now send consumers a notice imbodying the literal language of §809(a)(4), including the portions underlined. The result is that consumers are led to believe that a judgment exists against them, even when (as is true in most cases) there is no such judgment. [Ref. Ch. 10, DA Pam 27-12.]

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Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Discharge Review Board needs four non-unit Reserve JAGC Officers to act as counsel for service personnel in August 1979, in the Washington, D.C., area for one week. (Exact dates are yet unknown.) If you are interested in five days of ADT plus travel time, please call Lieutenant Colonel Carew or Captain Rehyansky at TJAGSA, (804) 293-6131.

Be prepared to submit DA Form 1058 requesting ADT. Besides the usual information recorded on DA Form 1058, include height and weight as well as date of last military physical exam.

Mobilization Designee Vacancies

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Lieutenant Colonel William Carew, Reserve Affairs Department, Charlottesville, Virginia 22901.

Current positions available are as follows:

GRD	*PARA*	*LIN*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
COL	03	01	01	Staff Judge Advocate	USA Garrison	Ft Hood
COL	18C	02	01	Asst C Clas Invt	OTJAG	Washington
COL	04	01	01	Staff Judge Advocate	USA Garrison	Ft Bragg
CPT	03E	03	01	Asst SJA	USA Garrison	Ft Stewart
CPT	01H	02A	02	Judge Advocate	ft McCoy	Sparta
CPT	01H	02A	01	Judge Advocate	Ft McCoy	Sparta
CPT	52C	01	01	Asst SJA	USA Garrison	Ft Stewart
CPT	08	03A	02	Asst JA	172d Inf Bde	Ft Richardson
CPT	03C	06	01	Admin Law Officer	USA Garrison	Ft Devens
CPT	03D	05	02	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	02B	04	01	Asst JA	1st Inf Div	Ft Riley
CPT	03B	02	01	Defense Counsel	101st Abn Div	Ft Campbell
CPT	02C	02	01	Asst JA	1st Inf Div	Ft Riley
CPT	03A	02	01	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03B	03	02	Def Counsel	5th Inf Div	Ft Polk
CPT	03B	03	03	Def Counsel	5th Inf Div	Ft Polk
CPT	08	03A	01	Asst JA	172d Inf Bde	Ft Richardson
CPT	03D	03	01	Asst SJA	9th Inf Div	Ft Lewis
CPT	01H	02A	03	Judge Advocate	Ft McCoy	Sparta

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
CPT	03E	03	02	Legal Asst Off	9th Inf Div	Ft Lewis
CPT	28C	03	01	Defense	USAAD Cen	Ft Bliss
CPT	03B	03	04	Def Counsel	5th Inf	Ft Polk
CPT	03E	03	01	Legal Asst Off	9th Inf Div	Ft Lewis
CPT	03F	01	01	Ch, Claims Br	9th Inf Div	Ft Lewis
CPT	03B	02	02	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	04	Defense Counsel	101st Abn Div	Ft Campbell
CPT	04	08	02	Asst SJA	USA Garrison	Ft Sam Houston
CPT	21J	01	01	Judge Advocate	9th Inf Div	Ft Lewis
CPT	04	08	01	Asst SJA	USA Garrison	Ft Sam Houston
CPT	52B	03	01	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	01H	02A	04	Judge Advocate	Ft McCoy	Sparta
CPT	62C	05	01	Asst Crim Law Off	USA Forces Cmd	Ft McPherson
CPT	03C	02	01	Asst SJA	101st Abn Div	Ft Campbell
CPT	03B	04	04	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	02	Trial Counsel	5th Inf Div	Ft Polk
CPT	03D	01A	01	Asst JA	USA Garrison	Ft Sheridan
CPT	03B	04	01	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	03	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	02	03	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	03	01	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	05	02	Defense Counsel	USA Garrison	Ft Devens
CPT	03D	01	01	Asst SJA—Claims Off	USA Garrison	Ft Devens
CPT	08	04	02	Asst JA	172d Inf Bde	Ft Richardson
CPT	03D	05	01	Asst SJA—DC	USA Garrison	Ft Stewart
LTC	03A	01	01	Ch, Crim Law Br	9th Inf Div	Ft Lewis
LTC	05B	03	02	Claims JA	USA Claims Svc	Ft Meade
LTC	03	02	01	Staff Judge Advocate	5th Inf Div	Ft Polk
LTC	11A	04	01	JA Opinions Br	OTJAG	Washington
LTC	12	01	01	Judge Advocate	ARNG ISA Cp	Edinburg
LTC	03	02	01	Deputy SJA	USA Garrison	Ft Hood
LTC	05B	03	01	Claims JA	USA Claims Svc	Ft Meade
LTC	05A	02	01	Deputy Chief	USA Claims Svc	Ft Meade
LTC	09B	01	01	ASJA—Res Affrs	Fifth US Army	Ft Sam Houston
LTC	05B	02	01	Deputy Chief	USA Claims Svc	Ft Meade
MAJ	03D	01	01	Ch, Crim Law	USA Garrison	Ft Stewart
MAJ	12	02	02	Asst JA	ARNG ISA CP	Edinburg
MAJ	02	02	01	Asst JA	ARNG ISA CP	Edinburg
MAJ	03C	01	01	Ch, Leg Asst Off	USA Garrison	Ft Devens
MAJ	03E	01	01	Chief	USA Garrison	Ft Stewart
MAJ	04	04	01	Asst SJA	USA Garrison	Ft Sam Houston
MAJ	03C	02	01	Ch, Admin Law	USA Garrison	Ft Devens
MAJ	21	02	01	Leg Asst Off	USA Depot Red River	Texarkana
MAJ	03B	02	01	Ch, Trial Counsel	5th Inf Div	Ft Polk
MAJ	03A	01	01	Ch, Trial Counsel	101st Abn Div	Ft Campbell
MAJ	28D	02	01	PRCC/Fiscal Law C	USA AD Cen	Ft Bliss
MAJ	03C	01	02	Asst SJA	5th Inf Div	Ft Polk
MAJ	03B	01	01	Ch, Defense Counsel	101st Abn Div	Ft Campbell

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
MAJ	02A	04	01	Ch, Trial Counsel	1st Inf Div	Ft Riley
MAJ	28B	02	01	Justice Off	USA AD Cen	Ft Bliss
MAJ	03C	01	01	Ch, Admin Law Br	101st Abn Div	Ft Campbell
MAJ	28B	04	01	Trial Counsel	USA AD Cen	Ft Bliss
MAJ	28D	03	01	Admin Law	USA AD Cen	Ft Bliss
MAJ	03B	01	01	Ch, Trial Counsel	9th Inf Div	Ft Lewis
MAJ	03E	01	01	Ch, Legal Asst Br	9th Inf Div	Ft Lewis
MAJ	62C	04	01	Asst Crim Law Off	USA Forces Cmd	Ft McPherson
MAJ	06	04	04	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston
MAJ	62D	04	01	Fiscal Law Off	USA Forces Cmd	Ft McPherson
MAJ	03D	01	01	CH, Admin Law Br	9th Inf Div	Ft Lewis
CW4	03	01	01	Legal Admin Tech	5th Inf Div	Ft Polk
MAJ	03C	01	01	Ch, Defense Counsel	9th Inf Div	Ft Lewis
CPT	04B	02A	p2	Asst JA	USA Garrison	Ft Meade
LTC	04H	02	01	Deputy SJA	HQ USACERCOM	Ft Monmouth
CPT	01I	02	02	Mil Af Le Ast Of	Ft McCoy	Sparta
CPT	01I	02	01	Mil Af Le Ast Of	Ft McCoy	Sparta
COL	02	01	01	Staff Judge Advocate	USA Garrison	Ft Riley
LTC	02	02	01	Asst SJA	USA Garrison	Ft Riley
LTC	02A	01	01	Ch, Crim Law	USA Garrison	Ft Riley
MAJ	02A	02	01	Ch, Defense Counsel	USA Garrison	Ft Riley
MAJ	02A	04	01	Ch, Trial Counsel	USA Garrison	Ft Riley
MAJ	02B	02	01	Asst Judge Advocate	USA Garrison	Ft Riley
MAJ	02B	03	01	Ch, Legal Asst	USA Garrison	Ft Riley

2. Additional positions will be approved in the near future. Judge Advocates wishing to be considered for *any* available Mob Des position should so annotate DA Form 2976.

CLE NEWS

1. TJAGSA CLE Courses.

20 Aug 79–23 May 80: 28th Graudate Course (5-27-C22).

18 Aug. 80–22 May 81: 29th Graduate Course (5-27-C22).

22 Oct–21 Dec 79: 91st Judge Advocate Officer Basic Course (5-27-C20).

4 Feb—4 Apr 80: 92d Judge Advocate Officer Basic Course (5-27-C20).

4 Aug–30 Oct 80: 93d Judge Advocate Officer Basic Course (5-27-C20).

19–22 May 80: 7th Methods of Instruction.

9–12 Oct 80: JAG Conference and CLE Seminars.

16–27 Jun 80: JAGSO Reserve Training.

7–18 Jul 80: USAR School BOAC (Phase II).

7–18 Jul 80: JAG Reserve Component C&GSC.

21–25 Apr 80: 10th Staff Judge Advocate Orientation (5F-F52).

7–16 May 80: 2d Militray Lawyer's Assistant Course (512-71D20/50).

26–30 Nov. 79: 50th Senior Officer Legal Orientation (5F-F1).

4–8 Feb 80: 51st Senior Officer Legal Orientation (5F-F1).

31 Mar–4 Apr 80: 52d Senior Officer Legal Orientation (5F-F1).

28 Apr—1 May 80: 53d Senior Officer Legal Orientation (War College) (5F-F1).

9-13 June 80: 54th Senior Officer Legal Orientation (5F-51).

4-8 Aug 80: 55th Senior Officer Legal Orientation (5F-F1).

22-26 Sep 80: 56th Senior Officer Legal Orientation (5F-F1).

29 Oct-9 Nov 79: 82d Contract Attorneys (5F-F10).

3-14 Mar 80: 83d Contract Attorneys (5F-F10).

21 Apr-2 May 80: 84th Contract Attorneys (5F-F10).

21 Jul-1 Aug 80: 85th Contract Attorneys (5F-F10).

7-11 Jan 80: 10th Contract Attorneys Advanced (5F-F11).

13-16 Nov 79: 10th Fiscal Law (5F-F12).

20-23 May 80: 11th Fiscal Law (5F-F12).

9-11 Apr 80: 1st Contract Claims, Litigation & Remedies (5F-F13).

14-18 Jan 80: 1st Negotiations, Changes and Terminations (5F-F14).

4-5 Dec 79: 3d Contract Attorneys Workshop (5F-F15).

16-27 Jun 80: 2d Civil Law (5F-F21).

25-29 Feb 80: 19th Federal Labor Relations (5F-F22).

17-20 Mar 80: 7th Legal Assistance (5F-F23).

10-13 Dec 70: 7th Military Administrative Law Developments (5F-F25).

21-24 Jan 80: 9th Environmental Law (5F-F27).

14-16 Nov 70: 4th Government Information Practices (5F-F28).

15-18 Oct 79: 3d Litigation (5F-F29).

4-8 Aug 80: 10th Law Office Management (7A-713A).

8-9 Apr 80: 2d US Magistrate Workshop (5F-F53).

11-15 Feb 80: 6th Criminal Trial Advocaty (5F-F32).

19 May-6 June 80: 20th Military Judge (5F-F33).

14 Jul-1 Aug 80: 21st Military Judge (5F-F33).

22-26 Oct 79: 7th Defense Trial Advocacy (5F-F34).

28 Jan-1 Feb 80: 8th Defense Trial Advocacy (5F-F34).

5-16 May 80: 2d International Law II (5F-F41).

7-11 Jan 80: 13th Law of War Workshop (5F-F42).

10-14 Mar 80: 14th Law of War Workshop (5F-F42).

10-12 Sep 80: 2d Legal Aspects of Terrorism (5F-F43).

28-30 May 80: 1st SJA Responsibilities Under New Geneva Protocols (5F-F44).

2. For further information on civilian courses, please contact the institution offering the course, at the address listed below:

AAJE: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 243-1630.

ATLA: The Association of Trial Lawyers of America, Education Department, P.O. Box 3717, 1050 31st St., NW, Washington, DC 20007. Phone: (202) 965-3500.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

FPI: Federal Publications, Inc., Seminar Divi-

sion Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

NCAJ: National Center for Administration of Justice, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NJC: National Judicial College, Reno, NV 89557. Phone: (702) 784-6747.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444. (In MN call (612) 338-1977).

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212)765-5700.

JULY

1-6: NJC, Criminal Law (graduate, for judges) University of Nevada, Reno, NV.

8-13: ALI-ABA, Environmental Litigation, University of Colorado School of Law, Boulder, CO.

8-13: NJC, Sentencing, Corrections and Prisoner's Rights (graduate, for judges), University of Nevada, Reno, NV.

9-11: FPI: Project Management, Sheraton National, Arlington, VA.

9-20: NJC, Trial Judges Academy, University of Nevada, Reno, NV.

9-20: AAJE, The Trial Judges Academy, School of Law University of Colorado, Boulder, CO.

12-13: PLI, Patent Litigation Workshop: The Anatomy of a Patent Trial, The Sheraton Centre Hotel, New York, NY.

15-20: ATLA, 1979 Advocacy Colleges, University of Nevada, Reno, NV.

22-27: ALI-ABA, The New Federal Bankruptcy Code—In Depth, Stanford Law School, Stanford, CA.

AUGUST

6-17: AAJE, The Trial Judges Academy, University of Virginia School of Law, Charlottesville, VA.

12-17: ATLA, 1979 Advocacy Colleges, Georgetown University Law Center, Washington, DC.

SEPTEMBER

13-14: ALI-ABA, Estate Planning, New England Law Institute, Inc. Boston, MA.

14-15: ALI-ABA, Trial Evidence in Federal and State Courts: A Clinical Study of Recent Developments, Charleston, SC.

14-15: ALI-ABA: Consumer Cases under the Bankruptcy Code, New Orleans, La.

27-29: ALI-ABA, Atomic Energy Licensing and Regulation, Washington, DC.

Current Materials of Interest

McCarthy, LT James F., and Jacobsen, LT Walter L., U.S.N., "Military Discovery," 15 Trial 45 (April 1979).

Higginbotham, A. Leon, Jr., Judge, *In the Matter of Color: Race and the American Legal Process, The Colonial Period.* New York: Oxford University Press, 1978. Pp. 448. Illustrations; subject-matter index. Cost: $15.00.

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Major General, United States Army
The Adjutant General

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